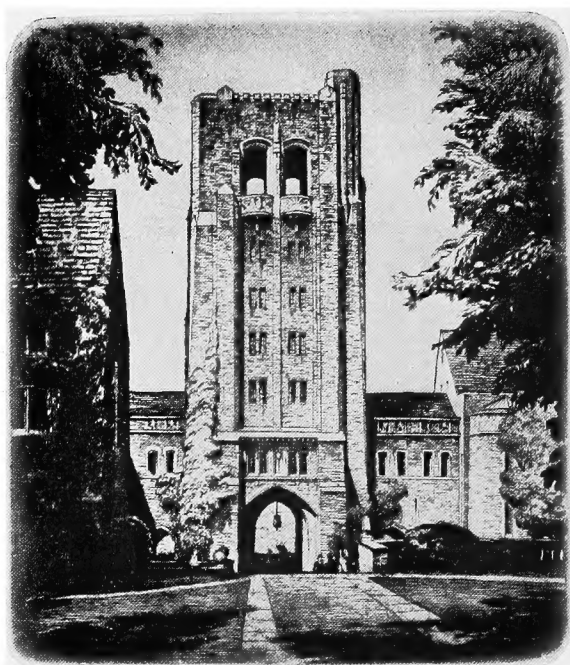


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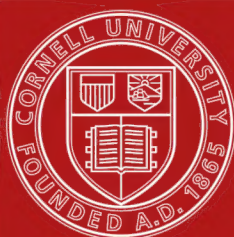


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1914 SUPPLEMENT  
TO  
A TREATISE ON  
**PLEADING AND PRACTICE**  
IN THE COURTS OF RECORD OF  
**NEW YORK**

INCLUDING PLEADING AND PRACTICE IN ACTIONS  
GENERALLY AND APPELLATE PROCEDURE

WITH FORMS

BY  
CLARK A. NICHOLS

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## PREFACE

Five years have elapsed since the last annotations to Nichols' New York Practice were published. During that time there have been many important amendments of the Code of Civil Procedure and of the General Rules of Practice, as well as a multitude of decisions relating to matters of practice within the scope of the original work. The aim of this volume is to bring the work down to date by including, at least the substance, of all pertinent amendments of the Code and of the General Rules of Practice, in their proper place, as well as the decisions of the courts.

By the use of these annotations, the practitioner can easily and quickly determine whether the law as stated in the original four volumes has been reversed, changed, modified, or affirmed. In doing this work, it has been necessary to consider the question of space so that it has been deemed advisable to use as few words as possible, leaving it to the practitioner to consult the decisions for details.

In using these annotations, the original work should always be first consulted. The first step, if the construction of a provision of the Code of Civil Procedure, Rules of Practice, or any statute coming within the scope of this work, is in question, is to turn to pp. xi-xxxii of volume 4 and find out where the rule or statute is considered. On the other hand, if a decision in point is found, published before the time of the original work, turn to pp. 4181-4338 of volume 4 and from the table of cases determine where it has been cited.

As a third alternative, if neither of the above are feasible, consult the index found on pp. 4339-4610 of volume 4 of the work. Having found the place where the question in hand is treated, the next step is to consult the present volume which is absolutely necessary but easily done. Thus, suppose the question relates to receiving a verdict. It is treated of in volume 2, pp. 2357-2359, § 1818. In this case, turn to this volume and look under the paragraph or paragraphs beginning with the figures **2357**, **2358** or **2359**. If the point decided is a new one it is preceded by the page and section number or merely by the page number, as, in this case **2357** § 1818 or **2358** or **2359** according to what seems the better place for the point. On the other hand, if the decision or amendment relates directly to a text proposition followed by a note number, the annotation will be preceded by figures such as **2357** n. 1056 which means that the proposition on page 2357, note 1056 is reiterated, modified, added to, amended or reversed by the statute, rule of practice, or decision cited in the annotations. If the proposition is merely reiterated by a decision, only the title of the case is given.

Prior annotations are all included in this volume, so as to thereby obviate any necessity for referring to any other annotations.

CLARK A. NICHOLS.

New York City,  
Sept. 1, 1914.



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# BOOK I

## GENERAL PRACTICE

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### PART I

#### MATTERS TO BE CONSIDERED BEFORE INSTITUTION OF PROCEEDINGS

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#### CHAPTER I

##### NATURE AND KIND OF, AND GENERAL RULES RELATING TO, JUDICIAL PROCEEDINGS

**12 § 5.** See also post, 306, § 356. What are final orders in special proceedings so as to be appealable as of right to Court of Appeals, see post, 3613, § 2538, vol. 4, p. 3614. An application for the commitment of an insane person to the state hospital is not a special proceeding. *Matter of Murtaugh*, 117 App. Div. 302, 102 N. Y. Supp. 176. A proceeding after foreclosure of a mortgage to distribute surplus moneys is a special proceeding. *Velleman v. Rohrig*, 193 N. Y. 439, 86 N. E. 476 [affirming 111 N. Y. Supp. 736].

**14 n. 21.** *Matter of Depue*, 185 N. Y. 60, 77 N. E. 798.

**17.** An application to compel a purchaser at a judicial sale to take title and that of a purchaser to be relieved from his bid are special proceedings. *Parish v. Parish*, 175 N. Y. 181, 67 N. E. 298. Proceedings under section 915 of the Code to punish a witness for contempt in failing to give testimony for use in an action in another state are special

proceedings. *Matter of Strong*, 177 N. Y. 400, 69 N. E. 721. Disbarment proceedings are special proceedings. *Matter of Spencer*, 137 App. Div. 330, 122 N. Y. Supp. 190. Proceeding before board of assessors to obtain damages by abutters, for construction of bridge, held not a special proceeding. *People ex rel. Watt v. Zucca*, 160 App. Div. 578.

18 § 6. "An action for compensation measured by the profits of a business is an action at law and not a suit in equity in which the plaintiff is entitled to an accounting, and although it becomes necessary to take an account to determine the amount which the plaintiff is entitled to recover, that is incidental and is not an equitable accounting." *Freeman v. Miller*, 157 App. Div. 715, 719, 142 N. Y. Supp. 797. Right to maintain action at law, as distinguished from suit in equity, must exist when action is brought. *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53 [reversing on other grounds 107 N. Y. Supp. 313]. An action for services, under an agreement to pay therefor a certain per cent. of the net profits of the employer's business, is an action at law, though an accounting may be necessary to determine the amount of profits. *Lindner v. Starin*, 128 App. Div. 664, 113 N. Y. Supp. 201. Action to recover royalty is action at law. *Henderson v. Dougherty*, 95 App. Div. 346, 351, 88 N. Y. Supp. 665.

18 n. 56. Pleader need not declare on any distinctive form of action in order to recover. *Tyndall v. Beatty*, 57 Misc. 646, 108 N. Y. Supp. 697.

21 n. 74. *Schulsinger v. Blau*, 84 App. Div. 390, 82 N. Y. Supp. 686.

21 n. 75. Followed in *Zeiser v. Cohn*, 44 Misc. 462, 471, 90 N. Y. Supp. 66.

27. In an appropriate case, plaintiff may elect to sue either on contract or in tort. *Frankel v. Dinitz*, 83 Misc. 124, 144 N. Y. Supp. 770.

27 n. 91. Every intendment in favor of waiver of tort.

Barber v. Ellingwood, 137 App. Div. 704, 122 N. Y. Supp. 369.

28. An action by a tenant against his landlord to recover damages for failure to make repairs as provided for by contract, whereby the tenant suffered a personal injury, is based on contract. *Spero v. Levy*, 43 Misc. 24, 86 N. Y. Supp. 869. Where no objection is made, and the claim is treated by both parties as *ex contractu*, an appellate court will not interfere. *La Grange v. Merritt*, 96 App. Div. 61, 89 N. Y. Supp. 32. If plaintiff elects to sue in tort he cannot recover in *assumpsit*. *Bermel v. Harnischfeger*, 97 App. Div. 402, 89 N. Y. Supp. 1029.

29. Whether action on contract or for conversion, see *Lange v. Schile*, 117 App. Div. 233, 101 N. Y. Supp. 1080.

29 n. 97. *Horst Co. v. Stocker*, 134 App. Div. 771, 119 N. Y. Supp. 372.

29 n. 98. *Starin v. Fonda*, 107 App. Div. 539, 95 N. Y. Supp. 379; *Price v. Parker*, 44 Misc. 582, 90 N. Y. Supp. 98.

29 n. 99. *New York Life Ins. Co. v. Hamilton*, 52 Misc. 189, 102 N. Y. Supp. 771.

30 n. 107. *Jones v. Leopold*, 95 App. Div. 404, 88 N. Y. Supp. 568. See, also, *Wood v. E. & H. T. Anthony & Co.*, 79 App. Div. 111, 79 N. Y. Supp. 829. So where the action is for money had and received. *Libman v. Cohen*, 69 Misc. 312, 125 N. Y. Supp. 488.

31 n. 109. Such an action is based on contract. *Citizens' Nat. Bank v. Wetsel*, 96 App. Div. 85, 88 N. Y. Supp. 1079.

32 n. 115. Ejection from street car. *Lynch v. Syracuse Rapid Transit Co.*, 66 Misc. 573, 124 N. Y. Supp. 169.

33 § 9. The controversy must be one which can be determined by an action as distinguished from a special proceeding. *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 563 [reversing mem. decision in 127 App. Div. 934, 111 N. Y. Supp. 1150]. Marketability of title may be submitted. *Lynch v. Rogers*, 150 App. Div. 311, 134 N. Y. Supp. 113.



**33 n. 125.** *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 563 [reversing mem. decision in 127 App. Div. 934, 111 N. Y. Supp. 1150]; *Hanrahan v. Terminal Station Commission*, 206 N. Y. 494, 100 N. E. 414; *Becker v. Oneida County*, 157 App. Div. 457, 142 N. Y. Supp. 221. Compare *De Leyer v. Britt*, 157 App. Div. 586, 142 N. Y. Supp. 752.

**34 n. 130.** *Kondolf v. Britton*, 160 App. Div. 381, 145 N. Y. Supp. 791; *Matter of Saunders*, 156 App. Div. 891, 141 N. Y. Supp. 1145; *Heasty v. Lambert*, 98 App. Div. 177, 90 N. Y. Supp. 595. The submission will be dismissed where all necessary parties are not brought in. *Schreyer v. Arendt*, 83 App. Div. 335, 82 N. Y. Supp. 122. Where a controversy as to the person entitled to the proceeds of a benefit certificate in a mutual benefit society was submitted, and the determination thereof depended on a construction of important provisions of the society's charter, the society was a necessary party to the submission. *Davin v. Davin*, 105 App. Div. 580, 94 N. Y. Supp. 281.

**34 n. 134.** Failure of the proposed submission to contain an agreement as to the facts which are admitted is not cured by the fact that opposite the title there is a memorandum to the effect that it is a case agreed on in a controversy submitted without action, pursuant to the Code of Civil Procedure. *Begen v. Curtis*, 81 App. Div. 91, 80 N. Y. Supp. 929.

**35 n. 136.** *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 563 [reversing mem. decision in 127 App. Div. 934, 111 N. Y. Supp. 1150].

**37.** Questions of fact cannot be determined. *Marx v. Brogan*, 188 N. Y. 431. It seems that there can be no judgment by default on the failure of one of the litigants to appear on the trial. *Heasty v. Lambert*, 98 App. Div. 177, 90 N. Y. Supp. 595.

**37 n. 151.** *McGoldrick v. Bodkin*, 140 App. Div. 196, 125 N. Y. Supp. 401.

**37 n. 154.** *Muller v. Kling*, 149 App. Div. 176, 133 N. Y. Supp. 614; *Werner v. Wheeler*, 142 App. Div. 358, 127 N. Y. Supp. 158; *Doyle v. John E. Olson Realty Co.*, 132 App. Div. 200, 116 N. Y. Supp. 834. Rule applied to Court of Appeals. *Bradley v. Crane*, 201 N. Y. 14, 94 N. E. 359.

**38 n. 163.** *Davin v. Davin*, 105 App. Div. 580, 94 N. Y. Supp. 281.

**39 § 17.** Knowledge is necessary to an election. *Russell v. Wilber*, 150 App. Div. 52, 134 N. Y. Supp. 463; *Sweeney v. Douglas Copper Co.*, 149 App. Div. 568, 134 N. Y. Supp. 247. The former remedy to recover damages for personal injuries resulting in death is cumulative with the remedy provided for by the Employers' Liability Act. *Monigan v. Erie R. Co.*, 99 App. Div. 603, 91 N. Y. Supp. 657; *Mulligan v. Erie R. Co.*, 99 App. Div. 499, 91 N. Y. Supp. 60.

**39 n. 171.** *Hiscock v. Tuck*, 122 App. Div. 116, 106 N. Y. Supp. 700.

**40 n. 175.** See *New York v. Williams*, 48 Misc. 77, 96 N. Y. Supp. 237.

**41 § 23.** See *Davenport v. Walker*, 132 App. Div. 96, 116 N. Y. Supp. 411.

**42.** That action to set aside assignment for benefit of creditors is not an election to take in hostility to the assignment, see *Matter of Garver*, 176 N. Y. 386, 68 N. E. 667.

**42 n. 185.** *Ideal Concrete Mach. Co. v. Natl. Park Bank*, 159 App. Div. 347, 145 N. Y. Supp. 119; *Eidlitz v. Manhattan Wrecking & Cont. Co.*, 84 Misc. 243.

**43.** The fact that an action at law was brought to enforce a contract and the complaint therein dismissed is not a bar to a subsequent action in equity to reform the contract so as to set out the real agreement between the parties, where the first action failed because the written contract could not be contradicted by parol evidence. The doctrine of election of

remedies has no application to such a case. *Baird v. Erie R. R. Co.*, 210 N. Y. 225, 104 N. E. 614.

**43 § 24.** An action on contract on the theory that the contract created a partnership is inconsistent with an action on the theory that the same contract was one of employment. *Sacker v. Marcus*, 43 Misc. 8, 86 N. Y. Supp. 83. There is no election of remedies where plaintiff sets out a cause of action at common law for negligence resulting in personal injuries, and afterwards seeks to amend so as to bring the case within the Employers' Liability Act. *Mulligan v. Erie R. Co.*, 99 App. Div. 499, 91 N. Y. Supp. 60; *Monigan v. Erie R. Co.*, 99 App. Div. 603, 91 N. Y. Supp. 657; *Kleps v. Bristol Mfg. Co.*, 107 App. Div. 488, 95 N. Y. Supp. 337.

**43 n. 194.** *Citizens' Nat. Bank v. Wetsel*, 96 App. Div. 85, 88 N. Y. Supp. 1079; *Baird v. Erie R. R. Co.*, 72 Misc. 162, 129 N. Y. Supp. 329.

**43 n. 195.** See also *Fureuli v. Bittner*, 69 Misc. 112, 125 N. Y. Supp. 36; *Wm. A. Thomas Co. v. Holst*, 120 N. Y. Supp. 747.

**44 § 25.** The statement in an affidavit, in opposition to a motion for a change of venue, that the action is in tort, does not constitute a binding election, where the statement was merely incidental and had no effect on the decision of the court. *Price v. Parker*, 44 Misc. 582, 90 N. Y. Supp. 98.

**45 n. 210.** Effect of ignorance of facts, see *Baird v. Erie R. R. Co.*, 72 Misc. 162, 129 N. Y. Supp. 329.

**45 n. 211.** An election of remedies is determined by the commencement of an action and not by the result of it. *Matter of Garver*, 176 N. Y. 386, 394, 68 N. E. 667.

**45 n. 214.** *Henry v. Herrington*, 193 N. Y. 218, 86 N. E. 29; *Mutual Auto Accessories Co. v. Beard*, 59 Misc. 174, 110 N. Y. Supp. 416; *Fifty-fourth St. Realty Co. v. Goodman*, 80 Misc. 639, 141 N. Y. Supp. 959.

**46 § 27.** A pending action is a bar though the complaint therein is demurrable, where the right to demur has been waived. *Romaine v. New York, N. H. & H. R. R. Co.*, 87 App. Div. 569, 84 N. Y. Supp. 491. The pendency of another action may be established by reading in evidence a copy of the complaint served on the defendant's attorney. *Id.* See *Place v. Rogers*, 101 App. Div. 193, 91 N. Y. Supp. 912 (where it was held proper to refuse to stay the sale under an interlocutory judgment in partition until the final determination of a pending ejectment action).

**46 n. 219.** *Cassidy v. Arnold*, 100 App. Div. 412, 91 N. Y. Supp. 570.

**46 n. 220.** But see *Rowan v. Sussdorff*, 147 App. Div. 673, 132 N. Y. Supp. 550.

**46 n. 222.** *Hirsh v. Manhattan R. Co.*, 84 App. Div. 374, 377, 378, 82 N. Y. Supp. 754.

**47 n. 223.** *Hart v. Hart*, 86 App. Div. 236, 83 N. Y. Supp. 897.

**47 n. 226.** *Hirsh v. Manhattan R. Co.*, 84 App. Div. 374, 82 N. Y. Supp. 754.

**48 n. 234.** *National Fire Ins. Co. of Hartford v. Hughes*, 189 N. Y. 84, 81 N. E. 562; *Standard Sewing Mach. Co. v. Kattell*, 132 App. Div. 539, 117 N. Y. Supp. 32; *Tyler v. Standard Wine Co.*, 52 Misc. 374, 102 N. Y. Supp. 65; *Fogarty v. Stange*, 72 Misc. 225, 129 N. Y. Supp. 610.

**49 § 36.** Not enough that first suit is brought, not by, but against the person who is plaintiff in the second action. *Westminster Presbyterian Church v. Presbytery of N. Y.*, 211 N. Y. 214.

**50 n. 247.** *Sammons v. Parkhurst*, 46 Misc. 128, 93 N. Y. Supp. 1063. And see *White v. Gibson*, 61 Misc. 436, 113 N. Y. Supp. 983. An action by the stockholders of a corporation on behalf of themselves and all other stockholders against the corporation and its directors for an accounting for the fraud of the directors should not be

dismissed because there had been commenced at the same time a statutory action for the same relief by a director, though the parties plaintiff were closely related and their interests in the subject-matter were similar, and though the director who brought the statutory action was joined as a plaintiff in the stockholders' action. *Loewenstein v. Diamond Soda Water Mfg. Co.*, 94 App. Div. 383, 88 N. Y. Supp. 313.

50 n. 251. *National Fire Ins. Co. of Hartford v. Hughes*, 189 N. Y. 84, 81 N. E. 1170; *Harlem Sav. Bank v. Larkin*, 156 App. Div. 666, 142 N. Y. Supp. 122. A pending action is not a bar where it does not necessarily result in a determination of all the issues presented by a second action. *Jordan v. Underhill*, 91 App. Div. 124, 128, 86 N. Y. Supp. 620.

51 n. 256. *Sowden & Co. v. Murray*, 114 N. Y. Supp. 164; *Jordan v. Underhill*, 91 App. Div. 124, 128, 86 N. Y. Supp. 620; *Jones v. Leopold*, 95 App. Div. 404, 88 N. Y. Supp. 568.

51 n. 259. *Curlette v. Olds*, 110 App. Div. 596, 97 N. Y. Supp. 144; *Scott v. Demarest*, 75 Misc. 289, 135 N. Y. Supp. 264.

51 n. 260. *Curlette v. Olds*, 110 App. Div. 596, 97 N. Y. Supp. 144.

52 § 41. Defendant, by not raising any question by motion or objection which indicates any reliance on the plea of another action pending, and by basing its motion for a dismissal on a distinct ground which did not involve such question, is deemed to have waived the defense, and cannot first urge the plea in an appellate court. *Hirsh v. Manhattan R. Co.*, 84 App. Div. 374, 82 N. Y. Supp. 754. Stay of proceedings, see vol. 2, p. 1916.

53 § 43. Eminent domain claim cannot be split into separate recoveries. *Long Island R. Co. v. State*, 157 App. Div. 12, 141 N. Y. Supp. 637.

54 § 44. "A tenancy from year to year, created by the tenant's holding over after the expiration of his original term, is a new term for each year of such holding over, upon the terms of the original lease so far as they are applicable to the new relation. It follows that a claim for unpaid rent of each year of such a holding over creates a separate and distinct cause of action. That such separate cause of action may be joined in one suit cannot be doubted, but it is equally clear that each may be made the subject of an independent action. The plaintiff might have grouped his several causes of action in a single suit, but he was not obliged to do so, and in bringing separate suits he was strictly within his rights." *Kennedy v. New York*, 196 N. Y. 19, 25, 89 N. E. 360. An action to recover on a quantum meruit for labor and materials furnished is not barred by judgment in an action to foreclose a mechanic's lien where it was expressly adjudged in the first action that there could be no recovery for the work and materials because the contract had not been performed or substantially performed. *Maeder v. Wexler*, 43 Misc. 16, 87 N. Y. Supp. 400. Where the buyer repudiates a contract for delivery of property in installments, because of the failure to deliver an installment, the buyer cannot split up his cause of action for damages by suing at different times for the nondelivery of past installments and remaining installments. *Pakas v. Hollingshead*, 42 Misc. 287, 86 N. Y. Supp. 560.

54 n. 274. *Dickinson v. Tysen*, 125 App. Div. 735, 110 N. Y. Supp. 269; *Welch v. Buchaus Soap Corporation*, 56 Misc. 689, 107 N. Y. Supp. 616; *Maeder v. Wexler*, 98 App. Div. 68, 90 N. Y. Supp. 598; *Howard v. Hunter*, 50 Misc. 576, 99 N. Y. Supp. 542; *Firestone v. Aetna Indemnity Co.*, 67 Misc. 443, 123 N. Y. Supp. 107. See *Spragg v. Barton*, 158 App. Div. 81, 142 N. Y. Supp. 616.

54 n. 275. *Banzer v. Richter*, 68 Misc. 192, 123 N. Y. Supp. 678.

**54** n. 277. *Frank J. Lennon Co. v. New York Mail Co.*, 81 Misc. 251, 142 N. Y. Supp. 483.

**55** n. 283. *Simon v. Bierbauer*, 154 App. Div. 508, 139 N. Y. Supp. 327; *Porter v. Casualty Co.*, 65 Misc. 485, 120 N. Y. Supp. 71.

**55** n. 284. *Kieley v. Kahn*, 50 Misc. 309, 98 N. Y. Supp. 774.

**55** § 44. But where a part of a demand has been assigned, a recovery by the assignor of the balance of the demand does not bar an action by his assignee to recover the amount assigned to him. *Goldshear v. Barron*, 42 Misc. 198, 85 N. Y. Supp. 395.

**55** § 45. Claims in connection with setting aside fraudulent conveyance cannot be litigated separately. *Maasch v. Grauer*, 123 App. Div. 669, 108 N. Y. Supp. 54.

**57** n. 297. Laws, 1906, c. 29, adds to the causes of action which may be joined, as subdivision 11 of section 484 of the Code, the following: "11. For penalties under the agricultural law." Laws 1907, c. 26, adds a subdivision, 12, which embraces actions "for penalties incurred under the public health law." The 1906 amendment changes the law laid down in *People v. Koster*, 50 Misc. 46, 97 N. Y. Supp. 829.

**58** § 49. Facts constituting negligence at common law, under the Employers' Liability Act of a sister state, and under the federal Employers' Liability Act, are one cause of action. *Payne v. N. Y., Susquehanna, etc., R. R. Co.*, 201 N. Y. 436, 95 N. E. 19. An action for personal injuries based both on common-law grounds and on the Employers' Liability Act states but one cause of action. *Hamnstown v. New York Cont. Co.*, 52 Misc. 634, 102 N. Y. Supp. 835. Action by stockholder to set aside fraudulent increase of stock held to state only one cause of action. *Witherbee v. Bowles*, 201 N. Y. 427, 95 N. E. 27. "The plaintiff complains of injury to his realty in that, in the construction of

additional stairways, exits and entrances to the railway system known familiarly as the subway, the defendants from May 1, 1910, until March 15, 1911, 'caused to be erected, maintained and operated' upon the surface of the streets and on the sidewalk in front of and adjacent to plaintiff's premises structures, engines, steam boilers, tool sheds, work shops, derricks, fences and buildings, and thereby and in the prosecution of construction worked injury to his property rights. And plaintiff complains that the defendants by the permanent erection and maintenance of such stairways, exits and entrances, have injured his premises and his rights appurtenant thereto. Thus I think there are pleaded two distinct and separate legal wrongs; one temporary and incident to the work of building the stairways, exits and entrances, and the other permanent in that the existence and maintenance of the stairways, exits and entrances are an injury to his property rights." *Stines v. New York*, 154 App. Div. 276, 277, 138 N. Y. Supp. 962. Separate contracts for several succeeding years, although for same work, are separate causes of action in an action for deceit in inducing the contracts. *Fischer v. New Yorker Staats Zeitung*, 149 App. Div. 48, 133 N. Y. Supp. 497. Libel against husband and wife states two causes of action. *Garrison v. Sun Printing, etc., Co.*, 144 App. Div. 428, 129 N. Y. Supp. 448. Complaint against employer for failure to furnish a safe place to work, and against a contractor for permitting iron to fall, states two causes of action. *Crosby v. Cowen & Co.*, 141 App. Div. 369, 126 N. Y. Supp. 204. Complaint alleging plaintiff was struck by a truck, but because of uncertainty to whom it belongs joining several as defendants, states more than one cause of action. *Croale v. Schwarzschild, etc., Co.*, 141 App. Div. 473, 126 N. Y. Supp. 301. Where a complaint to recover damages for personal injuries alleges that some one of several independent defendants was negligent, there is more than one cause of



action stated. *Brown v. Thompson Starrett Co.*, 139 App. Div. 632, 124 N. Y. Supp. 396. Suit by heir to set aside two deeds and a will for mental incompetency and undue influence states but a single cause of action. *Phillips v. Flagler*, 82 Misc. 500, 143 N. Y. Supp. 798. In equity suits, the joinder as defendants of persons interested in some phase of the action and who are proper or necessary for a complete determination thereof, does not constitute a misjoinder. *Colorado & S. R. Co. v. Blair*, 81 Misc. 654, 143 N. Y. Supp. 510. For false imprisonment and slander. *Kipp v. Siegel-Cooper Co.*, 120 N. Y. Supp. 988. Alleging architect's certificate fraudulently withheld. *Strauss v. Hanover Realty etc., Co.*, 3 Current Ct. Dec. 86. Action for work and material furnished under a contract and for prospective profits, where defendant refused to allow the contract to be completed, states but one cause of action. *Wieser v. Times Realty & Const. Co.*, 110 N. Y. Supp. 963. Separate causes of action are stated in an action by the representatives of a deceased servant against the master and a third person, where it is alleged the injury was caused by the concurrent negligence of defendants, the former not furnishing a safe place to work and the servants of the latter being negligent. *Hamnstown v. New York Contracting Co.*, 122 App. Div. 43, 106 N. Y. Supp. 880. A claim for sums due on a breach of contract for services and for damages caused by the breach constitutes two causes of action. *Carlson v. Albert*, 117 App. Div. 836, 102 N. Y. Supp. 944. The test is whether a recovery on one of them would bar an action on the other cause. *Carlson v. Albert*, 117 App. Div. 836, 102 N. Y. Supp. 944. Incidental relief sought in a partition suit does not constitute a separate cause of action. *Lawrence v. Norton*, 116 App. Div. 896, 102 N. Y. Supp. 481. A complaint charging a conspiracy and illegal combination, pursuant to which slanders were uttered and libels published, and plaintiff was illegally ar-

rested and maliciously prosecuted, states but a single cause of action. *Rourke v. Elk Drug Co.*, 75 App. Div. 145, 77 N. Y. Supp. 373, [followed in *Green v. Davies*, 83 App. Div. 216, 82 N. Y. Supp. 54]. *Contra*, *Green v. Davies*, 182 N. Y. 499, 75 N. E. 536 [reversing on this point 100 App. Div. 359, 91 N. Y. Supp. 470]. In an action by a stockholder of a corporation, a complaint alleging that one of defendants, by collusion with the directors, had fraudulently acquired stocks belonging to the corporation, and seeking to obtain a cancellation of the contract under which the securities were obtained, and the delivery of them to the corporation, states more than one cause of action. *O'Connor v. Virginia Pass. & Power Co.*, 184 N. Y. 46, 76 N. E. 1082 [reversing 107 App. Div. 630, 95 N. Y. Supp. 1149, which affirmed 45 Misc. 228, 92 N. Y. Supp. 161]. An action against a photographer who took a portrait, and a publisher who used it, to restrain its publication, it being alleged that it was used by defendants jointly, states but one cause of action. *Riddle v. MacFadden*, 116 App. Div. 353, 101 N. Y. Supp. 606. A stockholder's action for dividends and to restrain an increase in the capital stock states two causes of action. *Searles v. Gebbie*, 115 App. Div. 778, 101 N. Y. Supp. 199 [affirmed without opinion in 190 N. Y. 533]. Each publication of a libel constitutes a separate cause of action. *Fisher v. New Yorker Staats-Zeitung*, 114 App. Div. 824, 100 N. Y. Supp. 185. A complaint in an action for false imprisonment which sets out the successive acts of police officers in imprisoning plaintiff states a single cause of action against all. *Egleston v. Scheibel*, 113 App. Div. 798, 99 N. Y. Supp. 969. Action by stockholders to compel officers of corporations to account as stating but one cause of action, see *Ward v. Smith*, 95 App. Div. 432, 88 N. Y. Supp. 700. Complaint held to state but one cause of action against a corporation for rescission of a subscription. *Mack v. Latta*, 83 App. Div. 242, 252, 82 N. Y. Supp. 130.

**58 n. 300.** *Zeiser v. Cohn*, 44 Misc. 462, 90 N. Y. Supp. 66; *Hall v. Gilman*, 77 App. Div. 458, 463, 79 N. Y. Supp. 303. See *Young v. Equitable Life Assur. Soc.*, 112 App. Div. 760, 98 N. Y. Supp. 1052 (action by stockholder against directors); *Automatic Strapping M. Co. v. Twisted W. & S. Co.*, 159 App. Div. 656, 144 N. Y. Supp. 1037. For illustrations of complaints held to state but one cause of action, see *Wood v. Duncan*, 54 Misc. 628, 104 N. Y. Supp. 1035; *Fitch v. Sawyer Crystal Blue Co.*, 117 N. Y. Supp. 883; *Logan v. Whitley*, 129 App. Div. 666, 114 N. Y. Supp. 255; *Alison v. China & Japan Trading Co.*, 127 App. Div. 246, 111 N. Y. Supp. 100 (libel); *Erie County v. Baltz*, 125 App. Div. 144, 109 N. Y. Supp. 304. The rule in equity pleadings is much more liberal than in actions at law, and various separate and distinct facts showing grievance and constituting a right of action may be alleged in the complaint without making it subject to the objection that more than one cause of action is stated. *Young v. Equitable Life Assur. Soc.*, 112 App. Div. 760, 98 N. Y. Supp. 1052; *Hathorn v. Natural Carbonic Gas Co.*, 60 Misc. 341, 113 N. Y. Supp. 458.

**58 n. 301.** Definition followed in *Rogers v. Wheeler*, 89 App. Div. 435, 85 N. Y. Supp. 981 (which held that action for accounting against individuals and representatives of an estate involved but one cause of action).

**59.** A complaint in a suit to have four contracts relating to the same subject-matter annulled because of fraud held to state but one cause of action. *Park & Tilford v. Realty Adv. & Supply Co.*, 160 App. Div. 21. Matter of inducement is not a separate cause of action. *Fay v. Bronson*, 134 App. Div. 972, 119 N. Y. Supp. 423. Damages to property and person held not separate causes of action, where allegations as to injury to property were merely surplusage. *Vock v. Auterbourn*, 67 Misc. 168, 122 N. Y. Supp. 233. (See also post, 62 n. 317.)

59 n. 302. *Gray v. Heinze*, 82 Misc. 618, 144 N. Y. Supp. 1045. See also *Whittingham v. Darrin*, 45 Misc. 478, 92 N. Y. Supp. 752.

59 n. 309. *Pollitz v. Wabash R. R. Co.*, 142 App. Div. 755, 127 N. Y. Supp. 782; *Smith v. Irvin*, 108 App. Div. 218, 95 N. Y. Supp. 731. Where the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant which violates that right, the complaint states but a single cause of action, no matter how many forms and kinds of relief the plaintiff may be entitled to. *New York v. Knickerbocker Trust Co.*, 104 App. Div. 223, 93 N. Y. Supp. 937.

60. There is only one cause of action though several persons sue a railroad company for setting fire to a property where the plaintiffs have all acquired an interest in the property and there is only one negligent act. *Jacobs v. New York Cent. & H. R. R. Co.*, 107 App. Div. 134, 94 N. Y. Supp. 954.

60 n. 310. *Wright v. Simon*, 118 App. Div. 774, 103 N. Y. Supp. 911 [affirming 52 Misc. 360, 102 N. Y. Supp. 1108].

61 n. 312. *Pollitz v. Wabash R. R. Co.*, 142 App. Div. 755, 127 N. Y. Supp. 782; *Union Transit Co. v. Erie R. Co.*, 52 Misc. 293, 102 N. Y. Supp. 149. See *Mutual Life Ins. Co. v. McCurdy*, 118 App. Div. 815, 103 N. Y. Supp. 829; *Mutual Life Ins. Co. v. McCurdy*, 118 App. Div. 827, 103 N. Y. Supp. 837; *Young v. Equitable Life Assur. Soc.*, 49 Misc. 347, 99 N. Y. Supp. 446.

61 n. 313. So held in action for alienation of affections. *De Ronde v. Bell*, 116 App. Div. 191, 101 N. Y. Supp. 497.

62 n. 316. *New York Life Ins. Co. v. Hamilton*, 52 Misc. 189, 102 N. Y. Supp. 771.

62 n. 317. This case is overruled by *Reilly v. Sicilian Asphalt Pav. Co.*, 170 N. Y. 40, in so far as it holds that a

complaint setting up an injury to the person and an injury to property, resulting from the same tortious act, sets up but one cause of action.

62 n. 318. *Chalmers v. Murphy*, 159 App. Div. 810, 144 N. Y. Supp. 825; *Lee v. Brown*, 139 App. Div. 669, 124 N. Y. Supp. 204; *Dollard v. American Surety Co.*, 54 Misc. 72, 104 N. Y. Supp. 494. See *Dunn v. New York Herald Co.*, 119 App. Div. 477, 104 N. Y. Supp. 94.

62 n. 320. *Duclos v. Kelley*, 122 App. Div. 329, 106 N. Y. Supp. 1058.

62 n. 321. *Riddle v. MacFadden*, 116 App. Div. 353, 101 N. Y. Supp. 606.

62 § 52. The Code rules as to what causes of action may be joined apply to equitable as well as legal actions. *Green v. Dunlap*, 136 App. Div. 116, 120 N. Y. Supp. 583. Causes of action for fraud, conspiracy, and to recover property wrongfully transferred by a bankrupt, were held properly joined in *Bouton v. Wheeler*, 118 App. Div. 426, 104 N. Y. Supp. 33, although it would seem that but one cause of action was stated. A cause of action at law to recover a dividend declared cannot be united with a cause of action in equity to restrain an increase in the capital stock. *Searles v. Gebbie*, 115 App. Div. 778, 101 N. Y. Supp. 199 [affirmed in mem. decision in 190 N. Y. 533]. A cause of action in equity for an accounting cannot be joined with one at law for damages. *Mutual Life Ins. Co. v. Gillette*, 119 App. Div. 430, 104 N. Y. Supp. 683. Joinder of cause of action on bond with cause to foreclose mortgage held improper. *City Real Estate Co. v. King*, 58 Misc. 69, 110 N. Y. Supp. 231.

63. Overt acts pleaded as a result of alleged conspiracy held to constitute separate torts which could not be united in one action. *Bird v. Post*, 124 App. Div. 902, 108 N. Y. Supp. 252.

63 n. 324. Causes of action for money had and received may be joined as causes of action based on contract. *New*

York Life Ins. Co. v. Hamilton, 52 Misc. 189, 102 N. Y. Supp. 771.

63 n. 331. A common-law and a statutory cause of action for damages caused by a false report by an officer of a corporation may be joined, since both are causes of action for personal injuries. Hutchinson v. Young, 93 App. Div. 407, 87 N. Y. Supp. 678.

63 n. 334. Green v. Davies, 100 App. Div. 359, 91 N. Y. Supp. 470 [reversed on other grounds in 182 N. Y. 499].

64 n. 336. Gearity v. Strasbourger, 133 App. Div. 701, 118 N. Y. Supp. 257.

64 n. 338. Cause of action for permanent injury to realty may be joined with cause of action for temporary injury. Stines v. New York, 154 App. Div. 276, 138 N. Y. Supp. 962.

64 n. 344. Causes of action against several members of the board of supervisors to recover claims illegally audited by the board may be joined in a taxpayer's action, since both are for injuries to personal property. Wallace v. Jones, 182 N. Y. 37, which reverses 92 App. Div. 613, 86 N. Y. Supp. 1149.

64 subd. 3. An action for slander may be maintained against several persons. Green v. Davies, 182 N. Y. 499, 75 N. E. 536.

65 n. 348. A cause of action for the recovery of a chattel cannot be united with an equitable cause of action. Sisson v. Barnum, 134 App. Div. 53, 118 N. Y. Supp. 664, 667.

66. Must arise out of same transaction. Obermayer v. Geering, 130 N. Y. Supp. 674. Causes of action for tort, arising out of one transaction, for which all the defendants are answerable, may be joined. Stines v. New York, 154 App. Div. 276, 138 N. Y. Supp. 962. Libel, and recovery of damages for invasion of the right of privacy, are properly joined. D'Altomonte v. New York Herald Co., 154 App. Div. 453, 139 N. Y. Supp. 200. Causes of action by landlord for conversion of chattels and for breach of tenant's covenant

to safeguard the chattels held not to arise out of the same transaction. *White v. Improved Property Holding Co.*, 140 App. Div. 529, 125 N. Y. Supp. 366. A cause of action for the wrong done in putting on the market for sale a gun constructed of such defective material and so carelessly that it was unsafe for use and a danger to the community cannot be joined with a cause of action for breach of warranty owing to the explosion of a gun sold to plaintiff. *Reed v. Livermore*, 101 App. Div. 254, 91 N. Y. Supp. 986.

66 n. 356. Causes of action held within provision, see *Pollitz v. Wabash R. R. Co.*, 142 App. Div. 755, 127 N. Y. Supp. 782. Claims held not to so arise, see *Salter v. Bronx Nat'l Bk.*, 150 App. Div. 639, 135 N. Y. Supp. 702.

68. Joinder of causes of action in a complaint in an action for the reformation of an agreement and for an accounting, against an individual and a corporation, held proper on the ground that the causes of action arose out of the same transaction. *Woolf v. Barnes*, 46 Misc. 169, 93 N. Y. Supp. 219.

68 n. 361. See also *Rogers v. Wheeler*, 89 App. Div. 435, 85 N. Y. Supp. 981.

68 n. 363. Causes of action for injuries to person and to property from a single negligent act may be joined. *McInerney v. Main*, 82 App. Div. 543, 81 N. Y. Supp. 539.

69. Causes of action for accounting, by remainderman and personal representatives of the deceased life beneficiary arise out of the same transaction. *Hart v. Goadby*, 138 App. Div. 160, 123 N. Y. Supp. 166. Breach of contract and assault do not arise out of same transaction. *Hochman v. New Amsterdam Gas Co.*, 73 Misc. 453, 133 N. Y. Supp. 386. Official acts of directors of corporation, where separate and disconnected, held not to arise out of the same transaction. *People v. Equitable Life Assur. Soc.*, 124 App. Div. 714, 109 N. Y. Supp. 453. A cause of action for unlawfully taking from plaintiff's possession a pair of horses and a buggy and

converting them to defendant's own use cannot be joined with a cause of action for a subsequent assault and battery on plaintiff while he was engaged in an endeavor to regain possession thereof. *Campbell v. Hallihan*, 45 Misc. 325, 90 N. Y. Supp. 432. In a taxpayer's suit to recover from the board of supervisors the amount of certain bills claimed to have been illegally and collusively audited by them, causes of action relating to separate bills audited on different days are properly joined where the auditing of all of them is part of the same scheme. *Wallace v. Jones*, 182 N. Y. 37, 74 N. E. 576.

69 n. 370. *Paul v. Ford*, 117 App. Div. 151, 102 N. Y. Supp. 359.

71 n. 377. *McInerney v. Main*, 82 App. Div. 543, 547, 81 N. Y. Supp. 539, per *Hirschberg, J.*

71 n. 378. *Salter v. Bronx Nat'l Bk.*, 150 App. Div. 639, 135 N. Y. Supp. 702; *Rozwadow Young Men's Assoc. v. Langweil*, 136 N. Y. Supp. 1065; *Edison Electric Illuminating Co. v. Franklin H. Kalbfleisch Co.*, 127 App. Div. 298, 111 N. Y. Supp. 462; *Kaufman v. Morris Bldg. Co.*, 126 App. Div. 388, 110 N. Y. Supp. 663; *Hoag v. Lehigh Valley R. Co.*, 55 Misc. 388, 105 N. Y. Supp. 200; *Drexel v. Hollander*, 112 App. Div. 25, 98 N. Y. Supp. 104 (where one cause of action was for conversion and based on title in plaintiff and the other cause was based on title in defendant). A cause of action under section 31 of the Stock Corporation Law to recover damages for acts done in reliance on a false report of an officer of a corporation is not inconsistent with a common-law cause of action based on the same facts and asking for identical relief. *Hutchinson v. Young*, 93 App. Div. 407, 87 N. Y. Supp. 678. A cause of action for breach of a contract is inconsistent with one for damages for fraud in inducing the plaintiff to make it. *Edison Elec. Illuminating Co. v. Kalbfleisch Co.*, 117 App. Div. 842, 102 N. Y. Supp. 1039; *Realty Transfer Co. v. Cohn-Baer-Myers*



& Aronson Co., 116 N. Y. Supp. 1110. Causes of action for breach of contract and for conversion are inconsistent. *Hill v. McKane*, 71 Misc. 581, 128 N. Y. Supp. 819. Causes of action to rescind a contract and for breach thereof are inconsistent. *Kranz v. Lewis*, 115 App. Div. 106, 100 N. Y. Supp. 674; *Realty Transfer Co. v. Cohn-Baer-Myers & Aronson Co.*, 60 Misc. 623, 113 N. Y. Supp. 994; *Lomb v. Richard*, 45 Misc. 129, 91 N. Y. Supp. 881. Causes of action for false arrest and imprisonment and for malicious prosecution arising out of the same transaction are not necessarily inconsistent, and may therefore be joined in one complaint. *Gearity v. Strasbourger*, 133 App. Div. 701, 118 N. Y. Supp. 257. To be inconsistent, causes of action must be intrinsically discrepant and logically contradictory. Causes are not inconsistent because more proof is required in one instance than in the other. *Siefken v. Erie R. Co.*, 57 Misc. 222, 107 N. Y. Supp. 1060. Code provision applies, *inter alia*, to joinder of causes arising out of the same transaction. *People v. Equitable Life Assur. Soc.*, 124 App. Div. 714, 109 N. Y. Supp. 453. Election between inconsistent causes of action, see vol. 1, p. 1085.

72 § 55. Cause of action on infant's contract cannot be joined with one on guaranty of payment by his father. *International Text-Book Co. v. Fox*, 149 App. Div. 369, 134 N. Y. Supp. 383.

72 n. 387. *Wise v. Tube Bending Machine Co.*, 194 N. Y. 272, 81 N. E. 430 [affirming mem. decision in 105 N. Y. Supp. 1150]; *Trusts & Guarantee Co. v. Sawyer*, 146 App. Div. 63, 130 N. Y. Supp. 582; *Green v. Dunlop*, 136 App. Div. 116, 120 N. Y. Supp. 583; *Sprague v. Currie*, 117 N. Y. Supp. 482; *Hirsch v. New England Navigation Co.*, 129 App. Div. 178, 113 N. Y. Supp. 395; *People v. Equitable Life Assur. Soc.*, 124 App. Div. 714, 109 N. Y. Supp. 453 [affirming 51 Misc. 339, 101 N. Y. Supp. 354]; *O'Connor v. Virginia Pass. & Power Co.*, 184 N. Y. 46; *My-*

ers v. Lederer, 117 App. Div. 27, 101 N. Y. Supp. 1088; Case v. New York Mut. Sav. & Loan Ass'n, 88 App. Div. 538, 85 N. Y. Supp. 104; Warner v. James, 88 App. Div. 567, 85 N. Y. Supp. 153; Roberts v. Keene, 74 Misc. 238, 133 N. Y. Supp. 1091. See Automatic Strapping M. Co. v. Twisted W. & S. Co., 159 App. Div. 656, 144 N. Y. Supp. 1037. Application of rule. International Text Book Co. v. Fox, 149 App. Div. 369, 134 N. Y. Supp. 383. Taxpayer's suit. Hastings Pavement Co. v. Cromwell, 67 Misc. 212, 124 N. Y. Supp. 388. Stockholder's action belonging to corporation cannot be joined with one for dissolution of corporation. Dusenberry v. Sagamore Devel. Co., 157 App. Div. 485, 142 N. Y. Supp. 495. Where a certain amount of a life insurance policy is payable to the widow and a certain other part is payable to the eldest child, the two cannot join as plaintiffs in an action against the company. Conrad v. Southern Tier Masonic Relief Ass'n, 104 App. Div. 611, 93 N. Y. Supp. 626. Several owners of separate parcels of land cannot unite in an action against a railroad company to recover damages for flooding their lands. Burghen v. Erie R. Co., 53 Misc. 457, 103 N. Y. Supp. 292. No distinction is made between actions at law and suits in equity. People v. Equitable Life Assur. Soc., 124 App. Div. 714, 109 N. Y. Supp. 453.

73. The fact that the complaint in equity does not allege a joint act of defendants in perpetrating the alleged fraud does not show that the several causes of action do not affect all the parties to the action. Todaro v. Somerville Realty Co., 138 App. Div. 1, 122 N. Y. Supp. 509.

73 n. 388. Colorado & S. R. Co. v. Blair, 81 Misc. 654, 143 N. Y. Supp. 510; Rogers v. Wheeler, 89 App. Div. 435, 442, 85 N. Y. Supp. 981; Hall v. Gilman, 77 App. Div. 458, 463, 79 N. Y. Supp. 303. In an action in equity, it is not necessary that the alleged causes of action affect all the defendants to the same extent or in the same manner.

Lawrence v. Norton, 116 App. Div. 896, 102 N. Y. Supp. 481. Where the negligent acts of two or more persons contribute to the infliction of personal injuries on another, they may be sued together in one action as joint tortfeasors. Lynch v. Elektron Mfg. Co., 94 App. Div. 408, 88 N. Y. Supp. 70.

74. Cause of action in individual capacity on personal contract cannot be joined with one in which plaintiff sues as trustee. Natter v. Isaac H. Blanchard Co., 153 App. Div. 814, 138 N. Y. Supp. 969. Charging directors with misfeasance, where part of them joined as defendants were not directors at the time of the omissions complained of. Moran v. Vreeland, 81 Misc. 664, 143 N. Y. Supp. 522. A riparian proprietor may sue, in one action, all the upper riparian owners who contribute to the deposit of refuse and filth in the stream, though they act independently of each other. Warren v. Parkhurst, 186 N. Y. 45, 78 N. E. 579 [affirming 105 App. Div. 239, 93 N. Y. Supp. 1009]. But there is a misjoinder where several riparian owners unite in an action against several defendants to enjoin them from maintaining obstructions so as to flood the lands of plaintiffs and for damages for the injury already resulting therefrom, so far as the damages are concerned. Binghen v. Erie R. Co., 123 App. Div. 204, 108 N. Y. Supp. 311. Where insured held two fire policies of different amounts in two companies, and each company was to pay the proportional share of loss, and two appraisers were appointed,—one by the companies and the other by the insured,—and the appraisers appointed an umpire, an action to set aside their award, brought against both companies, is not bad for misjoinder. Mayer v. Phoenix Assur. Co., 124 App. Div. 241, 108 N. Y. Supp. 711.

74 n. 394. See also Brown v. Utopia Land Co., 118 App. Div. 364, 103 N. Y. Supp. 50; Groh v. Flammer, 100 App. Div. 305, 91 N. Y. Supp. 423.

**75 n. 402.** A cause of action by a stockholder against the president of the corporation for breach of contract, by which plaintiff was to hold the office of president, cannot be joined with a cause of action for wrongful appropriation of corporate funds. *Stoddard v. Bell & Co.*, 100 App. Div. 389, 91 N. Y. Supp. 477.

**75 n. 403.** *Rogers v. Wheeler*, 89 App. Div. 435, 85 N. Y. Supp. 981.

**76 n. 405.** But causes of action by administratrix both individually and as administratrix, to set aside sale, may be joined, where arising out of the same transaction. *Deigel v. Magee*, 74 Misc. 520, 132 N. Y. Supp. 665.

**76 n. 408.** A cause of action for conversion of the bonds and stocks of a corporation cannot properly be united with a cause of action against the directors for negligence or misconduct. *Schlesinger v. Fisk*, 60 Misc. 442, 113 N. Y. Supp. 578.

**78 n. 412.** *Conrad v. Conrad*, 124 App. Div. 780, 109 N. Y. Supp. 387; *Conrad v. Conrad*, 56 Misc. 376, 107 N. Y. Supp. 655.

**78 § 60.** Section 1790 of the Code is now Cons. Laws, c. 23, § 109.

## CHAPTER II

### STEPS PRELIMINARY TO COMMENCEMENT OF ACTION

**80 n. 1.** "It is the settled law of this State, announced in many decisions, that when a specific sum of money is made payable by the agreement of the parties, upon demand, or at a specified time, at a particular place, as against the original debtor, no demand at the time or place, prior to the commencement of the suit, is necessary." *First National Bank v. Story*, 200 N. Y. 346, 93 N. E. 940. Demand necessary where action on book account covering

mutual accounts. *Conner v. Chellis*, 161 App. Div. 360, 146 N. Y. Supp. 375.

**82 § 69.** Demand not necessary where defendant has sold the property. *Abramson v. Brimberg*, 120 N. Y. Supp. 746.

**82 n. 16.** *Friedman v. Phillips*, 84 App. Div. 179, 82 N. Y. Supp. 96; *Turner v. Cedar*, 91 N. Y. Supp. 758.

**83 § 72.** Demand on third persons, to support replevin, is insufficient where they have neither the custody nor control of the property. *Heinrich v. Van Wrinckler*, 80 App. Div. 250, 80 N. Y. Supp. 226. If a creditor notifies his debtor that he will appear for payment on a certain day, and the creditor calls on that day for the sole purpose of receiving his due, and this is known to the debtor, there is a sufficient demand. *Schlimbach v. McLean*, 83 App. Div. 157, 82 N. Y. Supp. 516.

**83 § 73.** When the fact upon which defendant's liability depends is within plaintiff's knowledge, notice should be given defendant before bringing the action. *Packard v. Long Island R. Co.*, 52 Misc. 98, 101 N. Y. Supp. 660.

**84 n. 31.** That a substantial compliance with the statute is sufficient, see *Williams v. Port Chester*, 97 App. Div. 85, 89 N. Y. Supp. 671.

**84 n. 33.** Many cases have been decided under this statute since its enactment. It is now well settled that notice is not a condition precedent where the complaint does not charge any liability based on the provisions of the statute. *Schermerhorn v. Glens Falls Portland Cement Co.*, 94 App. Div. 600, 88 N. Y. Supp. 407; *Gmaekle v. Rosenberg*, 178 N. Y. 147, 70 N. E. 411; *Rosin v. Lidgerwood Mfg. Co.*, 89 App. Div. 245, 86 N. Y. Supp. 49. But where the action is statutory, the giving of the notice is a condition precedent to the bringing of the action. *Grasso v. Holbrook, Cabot & Daly Contracting Co.*, 102 App. Div. 49, 92 N. Y. Supp. 101. Prior complaint in common-law action is not equivalent to notice. *Chisholm v. Manhattan*

R. Co., 116 App. Div. 320, 101 N. Y. Supp. 622. A type-written notice is sufficient. *Hunt v. Dexter Sulphite Pulp & Paper Co.*, 100 App. Div. 119, 91 N. Y. Supp. 279. Service of the notice after sixty days after the appointment of the administratrix, though within one hundred and twenty days after the accident, is held sufficient in *Hoehn v. Lautz*, 94 App. Div. 14, 87 N. Y. Supp. 921, but the contrary is held in *Randall v. Holbrook*, *Cabot & Daly Contracting Co.*, 95 App. Div. 336, 88 N. Y. Supp. 681. Necessity of pleading service of notice, see *Gmaehle v. Rosenberg*, 80 App. Div. 541, 80 N. Y. Supp. 705; *Id.*, 87 App. Div. 631, 84 N. Y. Supp. 1127, reversed in 178 N. Y. 147, 70 N. E. 411; *Williams v. Roblin*, 94 App. Div. 177, 87 N. Y. Supp. 1006. The notice served is insufficient where it does not state the cause of the injury. *Miller v. Solvay Process Co.*, 109 App. Div. 135, 95 N. Y. Supp. 1020; *Barry v. Derby Desk Co.*, 121 App. Div. 810, 106 N. Y. Supp. 575; *Finnigan v. N. Y. Contracting Co.*, 122 App. Div. 712, 107 N. Y. Supp. 855; *Glynn v. N. Y. C. & H. R. R. Co.*, 125 App. Div. 186, 109 N. Y. Supp. 103; *Kennedy v. N. Y. Telephone Co.*, 125 App. Div. 846, 110 N. Y. Supp. 887; *Bovi v. Hess*, 123 App. Div. 389, 107 N. Y. Supp. 1001; *Young v. Bradley & Son*, 129 App. Div. 678, 114 N. Y. Supp. 264.

**85 § 77.** The general rule, in the absence of statute, is that an action can be brought on a bond, by one not named as obligee therein, only by leave of court. *Alexander v. Union Surety & Guaranty Co.*, 89 App. Div. 3, 85 N. Y. Supp. 282.

**87 n. 45.** Who are "public officers," see Code Civ. Proc., § 1890. It is doubtful whether the trustee of a bankrupt's estate is a "public officer." *Alexander v. Union Surety & Guaranty Co.*, 89 App. Div. 3, 85 N. Y. Supp. 282.

**87 n. 47.** These Code provisions are now Cons. Laws, c. 23, §§ 131, 132.

88 n. 51. But suing without leave does not affect the jurisdiction of the court. *Pruyn v. Black*, 105 App. Div. 302, 93 N. Y. Supp. 995.

88 n. 53. See *Meeks v. Meeks*, 51 Misc. 538, 100 N. Y. Supp. 667.

88 n. 54. Failure to obtain leave to sue is a mere irregularity which can be cured or waived at any stage of the proceedings. *Meeks v. Meeks*, 51 Misc. 538, 100 N. Y. Supp. 667.

88 § 82. Supreme Court has inherent power to appoint a guardian ad litem for one adjudged a habitual drunkard when a committee only of his person and not of his property has been appointed. *Móore v. Flagg*, 137 App. Div. 338, 122 N. Y. Supp. 174. In an action by an infant on a judgment recovered in another state, the guardian ad litem in the original action is not a necessary party. *Finn v. Post*, 61 Misc. 136, 112 N. Y. Supp. 1046. Guardian ad litem cannot be appointed to sue in behalf of an incompetent, but action must be brought by his committee. *Rankert v. Rankert*, 105 App. Div. 37, 93 N. Y. Supp. 399. In some cases, however, the general guardian may sue as the trustee of an express trust, without appointing a guardian ad litem. *Schlieder v. Dexter*, 114 App. Div. 417, 99 N. Y. Supp. 1000.

89. An infant, prior to the appointment of a committee for him as an insane person, may sue by guardian ad litem. *Callahan v. New York Cent. & H. R. R. Co.*, 99 App. Div. 56, 90 N. Y. Supp. 657. Where, after a guardian ad litem has been appointed for an infant, he is afterwards adjudged insane and a committee appointed, such committee may be substituted as plaintiff in place of the infant, by his guardian; and it is not necessary to provide that the appointment of the committee for the purposes of the action be made nunc pro tunc as of the time of the commencement of this action, or allow the plaintiff generally to amend his complaint. *Id.*

89 n. 63. The guardian must be appointed by the court

in which the action has been or is to be brought, and with reference to the particular litigation. The Supreme Court cannot appoint a guardian ad litem for an infant plaintiff in the City Court of New York. *Goodfriend v. Robins*, 92 N. Y. Supp. 240.

90. Proper practice requires a verification of the petition though there is no statutory necessity. *Baumeister v. Demuth*, 84 App. Div. 394, 398, 82 N. Y. Supp. 831. Defects in the petition are amendable nunc pro tunc. *Id.*

90 n. 67. But see Code amendment, post, 570 n. 11.

90 n. 68. Consent signed by an "X" held sufficient. *Conroy v. Bigg*, 109 N. Y. Supp. 914.

93 n. 92. *Conroy v. Bigg*, 109 N. Y. Supp. 914; *Goodfriend v. Robins*, 92 N. Y. Supp. 240; *McGarity v. New York City R. Co.*, 51 Misc. 666, 101 N. Y. Supp. 191.

93 n. 94. *McGarity v. New York City R. Co.*, 51 Misc. 666, 101 N. Y. Supp. 191.

### CHAPTER III

#### COURTS AND THEIR OFFICERS

97 n. 4. Statutory jurisdiction given to a county judge does not confer jurisdiction on the County Court as such. *People ex rel. Cecere v. Slocum*, 161 App. Div. 734, 146 N. Y. Supp. 556.

99 § 94. City Court of New York is court of inferior jurisdiction. *Edgerly v. Blackburn*, 141 App. Div. 419, 125 N. Y. Supp. 353.

101 n. 16. Section 2 of the Code is now Cons. Laws, c. 30, § 2. Court of Claims is now "Board of Claims" but no change is made by the statute in its jurisdiction or procedure.

102 n. 17. Section 1351 of the Greater New York Charter expressly provides that the municipal court created thereby to take the place of the district courts of New York city



and the justices' courts of Brooklyn "shall not be a court of record." Section 3 of the Code is now Cons. Laws, c. 30, § 3.

104. Construction of New Mexico Code making Sunday the time between sunrise and sunset, and forbidding service of process on Sunday, see *Harrison v. Wallis*, 44 Misc. 492, 498, 90 N. Y. Supp. 44.

104 n. 24. Code provision is now Cons. Laws, c. 30, § 5.

105 n. 35. But not where agreed upon on Sunday where not made or delivered until Monday. *Ehrlich v. Pike*, 53 Misc. 328, 104 N. Y. Supp. 818. Proceeding with hearing of arbitration on Sunday, against objection, is illegal. In *re Picker*, 130 App. Div. 88, 114 N. Y. Supp. 289.

107 nn. 49, 50. Code provisions are now Cons. Laws, c. 30, §§ 52, 93, 94, 95.

107 n. 51. *Halgren v. Halgren*, 160 App. Div. 477; *Willner v. Mink Restaurant Co.*, 61 Misc. 73, 113 N. Y. Supp. 633; *Ackerman v. Ackerman*, 122 App. Div. 750, 108 N. Y. Supp. 534; *Rauchberger v. Interurban St. R. Co.*, 52 Misc. 518, 102 N. Y. Supp. 561.

108 § 102. Rules should not be technically construed where tending to defeat the ends of justice and prolong litigation. *Schultze v. Huttlinger*, 150 App. Div. 489, 135 N. Y. Supp. 70.

108 n. 56. *Boyer v. Boyer*, 129 App. Div. 647, 114 N. Y. Supp. 15; *Smith v. Warringer*, 41 Misc. 94, 83 N. Y. Supp. 655.

111 n. 66. See *People ex rel. Weick v. Warden of City Prison*, 117 App. Div. 154, 102 N. Y. Supp. 374.

111 n. 67. This Code section is amended by Laws 1909, c. 65, so as to read "Causes may be noticed for trial at any term of court adjourned as provided in section seven of the judiciary law, as if it was held by original appointment." The section is now a part of Cons. Laws, c. 30, §§ 7, 534, 560.

111 n. 70. Code provision is now Cons. Laws, c. 30, § 6.

**113 n. 75.** The Code requires written consent. Oral consent in open court is insufficient. *Armstrong v. Loveland*, 99 App. Div. 28, 90 N. Y. Supp. 711.

**113 n. 78.** This Code provision is amended by Laws 1909, c. 65, so as to read as follows: "A court of record may in its discretion where the parties to an action file a stipulation that the same be tried at a place within the county where said action is triable, other than the court house, adjourn the term to such place for the trial of said action. Notice of such an adjournment must be given as the court directs by the order." The old Code provision is now Cons. Laws, c. 30, § 8.

**113 nn. 77-80.** Code provisions are now Cons. Laws, c. 30, §§ 9, 10, 11, 12.

**114 § 116.** See *Montrose v. Baggott*, 161 App. Div. 494, 146 N. Y. Supp. 649.

**114 n. 82.** See *Matter of Runk v. Thomas*, 138 App. Div. 631, 638, 119 N. Y. Supp. 430. General rule stated. *Buffalo v. Erie Railroad Co.*, 83 Misc. 144, 144 N. Y. Supp. 578.

**114 § 117.** A judicial opinion is binding only so far as it is relevant and when it wanders from the point at issue it no longer has force as an official utterance. *Crane v. Bennett*, 177 N. Y. 106, 112, 69 N. E. 274, and cases cited. Construing as a whole, see *Carozza v. Russo*, 146 App. Div. 772, 131 N. Y. Supp. 448. An opinion of an appellate court must be interpreted as a whole and whatever is said must be tested by reference to the actual question before the court. *Hogan v. Board of Education*, 200 N. Y. 370; *Roberts & Lewis Co. v. Dale*, 74 Misc. 390, 132 N. Y. Supp. 404. Only decisions of higher courts that are binding. *Matter of Kathan*, 141 N. Y. Supp. 705. Former decision as binding, see *Pringle Bros. v. Philadelphia Casualty Co.*, 153 App. Div. 180, 138 N. Y. Supp. 330.

**114 n. 85.** See also *O'Brien v. Union Central L. Ins. Co.*,

207 N. Y. 180, 100 N. E. 702. Obiter dicta will not control subsequent decisions. *People ex rel. McLaughlin v. Police Com'rs of Yonkers*, 174 N. Y. 450, 466, 67 N. E. 78.

115 § 118. Affirmance by Court of Appeals without opinion is not necessarily an approval of the opinion of the lower court. *Cherrington v. Burchell*, 147 App. Div. 16, 130 N. Y. Supp. 631.

115 n. 90. So held though a determination of the question decided was not necessary. *Ryan v. New York*, 78 App. Div. 134, 79 N. Y. Supp. 599.

115 § 119. If facts not materially different, ruling on appeal will be followed on a subsequent appeal. *Casey v. Davis, etc.*, 149 App. Div. 423, 134 N. Y. Supp. 355. Affirmance without opinion of a Special Term order does not adopt the Special Term opinion. *Gould v. Seneca Falls*, 137 App. Div. 417, 121 N. Y. Supp. 723 [affirming 118 N. Y. Supp. 648].

116 n. 99. *McNulty Bros. v. Offerman*, 152 App. Div. 181, 137 N. Y. Supp. 27. The decision of a question of law by the Appellate Division should control a judge at Special Term. *William Fox Amusement Co. v. McClellan*, 114 N. Y. Supp. 594. It is the duty of the Special Term to follow the decision of the Appellate Division in the same department where there is a conflict between such decision and that of the Appellate Division of another department. *Maass v. Rosenthal*, 62 Misc. 350, 115 N. Y. Supp. 4.

116 n. 104. *Zeikus v. Florida East Coast R. Co.*, 153 App. Div. 345, 138 N. Y. Supp. 478.

117 § 121. Decision of federal court as to recovery of counsel fees in an action on an injunction bond will be followed in an action on a federal bond in a state court. *National Society of United States Daughters of 1912 v. American Surety Co. of New York*, 56 Misc. 627, 107 N. Y. Supp. 820.

117 n. 109. *People ex rel. C. P. N. & E. R. R. Co. v.*

Willcox, 194 N. Y. 383, 87 N. E. 517 [affirming 113 N. Y. Supp. 861].

117 n. 111. Construction of federal statutes binding on state courts. *United Lead Co. v. Lehigh Valley R. Co.*, 156 App. Div. 525, 114 N. Y. Supp. 310.

118 n. 113. Nor as against a decision of the Supreme Court as to a state statute. *In re Interborough Metropolitan Co.*, 56 Misc. 128, 106 N. Y. Supp. 416. Controlling only as to federal questions. *Platt v. Bonsall*, 136 App. Div. 397, 120 N. Y. Supp. 983.

118 n. 117. Code provision is now Cons. Laws, c. 30, § 4.

120 n. 122. This Code provision is repealed by Laws 1909, c. 65, and is now Cons. Laws, c. 30, §§ 28, 158, 194. And §§ 28 and 30 of the Code are now respectively Cons. Laws, c. 11, § 245, and c. 30, § 29.

123 § 131. Amendment of Code, § 1317, at least so far as equity suits are concerned, is constitutional. *Bonnette v. Molloy*, 209 N. Y. 167, 102 N. E. 559 [affirming 153 App. Div. 73, 138 N. Y. Supp. 67].

123 n. 135. *Owasco Lake Cemetery v. Teller*, 110 App. Div. 450, 96 N. Y. Supp. 985. That consent before an action or proceeding is commenced is not a waiver, see *Matter of Graham*, 39 Misc. 226, 79 N. Y. Supp. 573.

125 § 133. If full relief can be obtained in a Surrogate's Court, the Supreme Court will not entertain jurisdiction. *Childs v. Childs*, 68 Misc. 472, 124 N. Y. Supp. 550. A state court is without jurisdiction to enjoin proceedings before a federal court in another state. *Johnstown Min. Co. v. Morse*, 44 Misc. 504, 90 N. Y. Supp. 107.

126 n. 151. Action to construe a will. *Moore v. De Groote*, 158 App. Div. 828, 143 N. Y. Supp. 873.

126 n. 153. *Richman v. Consolidated Gas Co.*, 114 App. Div. 216, 100 N. Y. Supp. 81. See also *Beardslee v. Ingraham*, 183 N. Y. 411. Compare *Curlette v. Olds*, 110 App. Div. 596, 97 N. Y. Supp. 144.

**127 n. 136.** See also post, 348 n. 12.

**128.** A court of equity may enjoin a party to an action pending in this state from prosecuting an action subsequently commenced in another state. *Locomobile Co. of America v. American Bridge Co.*, 80 App. Div. 44, 80 N. Y. Supp. 288; *Webster v. Columbian Nat. Life Ins. Co.*, 62 Misc. 345, 115 N. Y. Supp. 892.

**128 n. 159.** Otherwise where parties are nonresidents. *Johnson v. Victoria Chief Copper, etc., Co.*, 65 Misc. 332, 119 N. Y. Supp. 639.

**128 n. 161.** The court may direct a sale of the part of the mortgaged land lying outside the state and a conveyance thereof to the purchaser. *Mead v. Brockner*, 82 App. Div. 480, 81 N. Y. Supp. 594.

**128 n. 164.** *Pruyn v. Black*, 105 App. Div. 302, 93 N. Y. Supp. 995.

**130 n. 169.** Action on bond executed in foreign state to recover deficiency on sale in foreclosure held maintainable in this state. *Hutchinson v. Ward*, 192 N. Y. 375, 85 N. E. 390.

**131 n. 170.** Nor for negligent injury. *Brisbane v. Pennsylvania R. R. Co.*, 205 N. Y. 431, 98 N. E. 752. Change of rule by 1913 Code amendment, see post, 348 n. 12.

**131 n. 172.** *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953, 2 Civ. Pro. 31; *Crashley v. Press Pub. Co.*, 179 N. Y. 27, 32, 71 N. E. 258; *Kleps v. Bristol Mfg. Co.*, 107 App. Div. 488, 95 N. Y. Supp. 337. Local courts should assume jurisdiction of an action for death of a resident by wrongful act where the remedy given by the foreign statute is practically the same as here. *Zeikus v. Florida East Coast R. Co.*, 153 App. Div. 345, 138 N. Y. Supp. 345; *Pensabene v. Auditore Co.*, 78 Misc. 538, 138 N. Y. Supp. 947. If foreign statute is entirely different, action for death in another state does not lie. *Zeikus v. Florida East Coast R. Co.*, 144 App. Div. 91, 128 N. Y. Supp. 933.

**131 n. 173.** *Collard v. Beach*, 81 App. Div. 582, 81 N. Y.

Supp. 619. It is immaterial that the objection to the jurisdiction was not taken on the first trial of the action or that the courts of the state where the cause of action arose will accept jurisdiction of like actions arising in the state of New York. *Collard v. Beach*, 93 App. Div. 339, 87 N. Y. Supp. 884. The Appellate Division, in the exercise of its discretion, may dismiss such a suit, although the trial court exercised its discretion to the contrary. *Pietraroia v. New Jersey & Hudson River Ry. Co.*, 197 N. Y. 434, 91 N. E. 120.

132 n. 177. *McFadden v. Innes*, 60 Misc. 543, 112 N. Y. Supp. 912; *Bridges v. Wade*, 110 App. Div. 106, 97 N. Y. Supp. 156.

132 n. 178. *Atkins v. Fitzpatrick*, 57 Misc. 341, 109 N. Y. Supp. 619.

132 n. 179. Section 1836a of the Code, added in 1911, provides as follows: "An executor or administrator duly appointed in any other state, territory or district of the United States or in any foreign country may sue or be sued in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued, if, within twenty days after any such executor or administrator shall commence, or appear in, any action or proceeding in any court in this state or within twenty days after he shall be required or directed by summons or otherwise to appear therein, there shall be filed in the office of the clerk of the court, in which such action or proceeding shall be brought or be pending, a copy of the letters testamentary or letters of administration issued to such executor or administrator duly authenticated as prescribed by section twenty-seven hundred and four of the Code of Civil Procedure; in default whereof all proceedings in such action or proceeding may be stayed until such duly authenticated copy of such letters shall be so filed." This changes the law as laid down in some of the decisions.

**133.** The fact that one of the joint executors is a non-resident does not preclude a suit in this state. *Mallory v. Virginia Hot Springs Co.*, 157 App. Div. 253, 141 N. Y. Supp. 961.

**134.** Action for personal injuries in another state cannot be entertained where plaintiff is a nonresident and defendant a foreign corporation. *Klunck v. Pennsylvania R. R. Co.*, 148 App. Div. 786, 133 N. Y. Supp. 207. See also *Tullock v. Delaware, etc., R. R. Co.*, 147 App. Div. 524, 132 N. Y. Supp. 88; *Pennica v. Delaware, etc., R. R. Co.*, 148 App. Div. 787, 133 N. Y. Supp. 295. Action by nonresident against a foreign corporation on a contract made and to be performed without the state is not within the jurisdiction of the court; the statute being exclusive. *Jones v. Burr Bros.*, 142 App. Div. 640, 127 N. Y. Supp. 478. Courts in this state have jurisdiction over negligence suit against a foreign corporation although the real estate injured is located in another state. *Brisbane v. Pennsylvania R. R. Co.*, 141 App. Div. 366, 125 N. Y. Supp. 1042. Foreign corporation may sue another foreign corporation in this state on check payable here. *Susquehanna Woolen Co. v. Imperial Coal & Coke Co.*, 66 Misc. 621, 122 N. Y. Supp. 214.

**134 n. 190.** *Portland Co. v. Hall & Grant Const. Co.*, 121 App. Div. 779, 106 N. Y. Supp. 649.

**135 n. 191.** *Lewis v. Guardian F. & L. Assur. Co.*, 93 App. Div. 157, 163, 87 N. Y. Supp. 525; *Armour v. Sound Shore Front Imp. Co.*, 71 Misc. 253, 128 N. Y. Supp. 331. By amendment of this Code provision in 1913 its scope is enlarged by adding as subd. 4 the following: "4. Where a foreign corporation is doing business within this state." This changes the law. Code provision does not preclude action by nonresident receiver of a foreign corporation to recover assets of judgment debtor diverted and held by residents of this state, although judgment was a foreign judgment against a foreign corporation. *Trotter v. Lisman*,

209 N. Y. 174, 102 N. E. 575. Where breach of contract can be said to occur, see *Wester v. Casein Co.*, 206 N. Y. 506, 100 N. E. 448 [rev. 140 App. Div. 442, 125 N. Y. Supp. 335]. The term "to affect the title to real property" as used in subd. 3, does not apply to an action for specific performance. *Wrightsville Hardware Co. v. Assets Realization Co.*, 159 App. Div. 849, 144 N. Y. Supp. 991. Applied to action by nonresident for personal injuries, by dismissing suit. *Payne v. New York, S. & W. R. Co.*, 157 App. Div. 302, 142 N. Y. Supp. 241. Statute relates to the jurisdiction of the subject-matter and not merely to the legal capacity to sue. *Payne v. New York, S. & W. R. Co.*, 157 App. Div. 302, 142 N. Y. Supp. 241. Construction of Code provision as extending to the subject-matter of the action, see *Payne v. New York, S. & W. R. Co.*, 157 App. Div. 302, 142 N. Y. Supp. 241. Effect of statute as giving cause of action for death by wrongful act, see *Zeikus v. Florida East Coast R. Co.*, 144 App. Div. 91, 128 N. Y. Supp. 933. Provision not unconstitutional as discrimination. *Johnson v. Victoria Chief Copper Min. Co.*, 150 App. Div. 653, 135 N. Y. Supp. 1070. This section of the Code is not in violation of the federal constitution in so far as it requires full faith and credit to be given to the judgment of a sister state nor as relating to equal privileges and immunities given to the citizens of one state in another state. *Anglo-American Provision Co. v. Davis Provision Co.*, 169 N. Y. 506, 62 N. E. 587 [aff. in 191 U. S. 373]. Actions between nonresidents and foreign corporations may be maintained in this state, under section 1780 of the Code of Civil Procedure, if the breach of the contract occurred within this state, no matter where the contract was made. *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.*, 32 Hun, 192; *Perry v. Erie Transfer Co.*, 19 N. Y. Supp. 239, 28 Abb. N. C. 430, and note; *Hilleary v. Skookum Root Hair Grower Co.*, 4 Misc. 127, 131, 23 N. Y. Supp. 1016; *Gundlin v. Hamburg-*



American Packet Co., 8 Misc. 291, 295, 28 N. Y. Supp. 572; Delaware, L. & W. R. Co. v. New York, S. & W. R. Co., 12 Misc. 230, 33 N. Y. Supp. 1081; Shelby Steel Tube Co. v. Burgess Gun Co., 8 App. Div. 444, 40 N. Y. Supp. 871; Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. Supp. 816. The courts of this state have jurisdiction of an action by resident stockholders of a foreign corporation against another foreign corporation to have declared void for fraud an agreement canceling a lease from defendant to the corporation of which plaintiffs are members. Jacobs v. Mexican Sugar Refining Co., 104 App. Div. 242, 93 N. Y. Supp. 776. When a judgment against a foreign corporation would not be effectual without the aid of the courts of a foreign country or of a sister state, and it may contravene the public policy of the foreign country or rest on the construction of a foreign statute, the interpretation of which is not free from doubt, the court should decline to assume jurisdiction. Hallenborg v. Greene, 66 App. Div. 590, 73 N. Y. Supp. 403, followed in Jacobs v. Mexican Sugar Refining Co., 44 Misc. 409, 89 N. Y. Supp. 1000. Objection cannot be urged by demurrer unless want of jurisdiction appears on the face of the complaint. MacGinniss v. Amalgamated Copper Co., 45 Misc. 106, 91 N. Y. Supp. 591.

**135 n. 192.** Whether a court will entertain an action to regulate the internal management of a foreign corporation is not a question relating to the jurisdiction of the court. Sauerbrunn v. Hartford Life Ins. Co., 159 App. Div. 121, 143 N. Y. Supp. 1009.

**135 § 137.** Johnston v. Mutual Reserve Life Ins. Co., 43 Misc. 251, 87 N. Y. Supp. 438. The County Court is one of limited jurisdiction the existence of which will not be presumed. Matter of Baker, 173 N. Y. 249, 252, 65 N. E. 1100. Of City Court of New York, see Edgerly v. Blackburn, 141 App. Div. 419, 125 N. Y. Supp. 353.

**136 n. 196.** Even though the rule that the jurisdiction of an inferior court is never presumed applies only to the subject-matter, and in other respects the rule as to courts of general jurisdiction obtains, it cannot avail a plaintiff suing on a judgment recovered in an inferior court on an insufficient affidavit of service, since the presumption in support of superior courts of general jurisdiction only applies to jurisdictional facts as to which the record is silent. *Frees v. Blyth*, 99 App. Div. 541, 91 N. Y. Supp. 103.

**137.** Conflict of jurisdiction as between state and federal courts as to appointment of receiver for corporation, see *People v. New York City R. Co.*, 57 Misc. 114, 107 N. Y. Supp. 247; *People v. Hasbrouck*, 57 Misc. 130, 107 N. Y. Supp. 257.

**140 n. 220.** State court has jurisdiction of action to recover for services rendered to a stranded barge under a contract. *Merritt & C. D. & W. Co. v. Tice*, 77 App. Div. 326, 79 N. Y. Supp. 120.

**140 n. 225.** *Moore v. Coyne & D. Mfg. Co.*, 113 App. Div. 52, 98 N. Y. Supp. 892; *Elbs v. Rochester Egg Carrier Co.*, 74 Misc. 262, 133 N. Y. Supp. 1082.

**141 n. 226.** *Schalkenbach v. National Ventilating Co.*, 129 App. Div. 389, 113 N. Y. Supp. 352.

**141 n. 231.** *Griffith v. Dodgson*, 103 App. Div. 542, 93 N. Y. Supp. 155.

**141 n. 232.** *Wise v. Tube Bending Mach. Co.*, 194 N. Y. 272, 87 N. E. 430.

**141 n. 233.** *Couch Patents Co. v. Berman*, 137 App. Div. 297, 121 N. Y. Supp. 978; *New York Phonograph Co. v. Davega*, 127 App. Div. 222, 111 N. Y. Supp. 363.

**142 n. 240.** But state courts have jurisdiction where defense is based thereon. *Outcault v. Lamar*, 135 App. Div. 110, 119 N. Y. Supp. 930.

**142 n. 241.** *Outcault v. Lamar*, 135 App. Div. 110, 119

N. Y. Supp. 930; *Stern v. Laemmle Music Co.*, 74 Misc. 262, 133 N. Y. Supp. 1082. State courts have jurisdiction of action merely involving question whether combination to control sale of copyrighted books is illegal, although necessary to construe rights under the copyright law. *Straus v. American Publishers' Ass'n*, 45 Misc. 251, 92 N. Y. Supp. 153.

**142 § 145.** See *Bloch v. Bloch*, 42 Misc. 278, 86 N. Y. Supp. 1047. Supreme Court has jurisdiction of action to determine and establish a lien on property of a bankrupt where the bankruptcy court does not enjoin the prosecution of such action. *Skilton v. Codington*, 185 N. Y. 80, 77 N. E. 790. State courts have concurrent jurisdiction with federal courts of action to recover property transferred by bankrupt to creditor as a preference, or the value of such property. *Stern v. Mayer*, 99 App. Div. 427, 91 N. Y. Supp. 292. Federal court decision in bankruptcy proceedings, where jurisdiction is concurrent, will be followed by state court. *Johnson v. Woodend*, 44 Misc. 524, 90 N. Y. Supp. 43.

**143 n. 243.** *Bouton v. Wheeler*, 118 App. Div. 426, 104 N. Y. Supp. 33; *Small v. Muller*, 67 App. Div. 143, 73 N. Y. Supp. 667, is followed in *Vollkommer v. Frank*, 107 App. Div. 594, 95 N. Y. Supp. 324. See *Goldsmith v. Haskell*, 120 App. Div. 403, 105 N. Y. Supp. 327.

**143 n. 252.** An action lies to recover damages for death caused by wrongful act in navy yard. *McCarthy v. R. G. Packard Co.*, 105 App. Div. 436, 94 N. Y. Supp. 203.

**150.** The Code provisions referred to are now a part of the Consolidated Laws (see table in front of book).

**152 § 159.** Inasmuch as the Supreme Court and the Appellate Division are enumerated separately in the constitution as courts of record, any reference in the Code or statutes to the Supreme Court is generally to the special or trial terms thereof. *O'Neil v. Mansfield*, 47 Misc. 516, 95 N. Y. Supp. 1009.

**157.** There is but one Supreme Court in this state. It follows that there is no want of jurisdiction where an action is brought in the Supreme Court of one county though the parties have expressly agreed that the action should be brought in another county. *Benson v. Eastern Bldg. & Loan Ass'n*, 174 N. Y. 83, 66 N. E. 627.

**158 n. 295.** An action in equity to remove trustees may be maintained in the Supreme Court though like proceedings are pending and afterwards instituted in the Surrogate's Court. *Westerfield v. Rogers*, 174 N. Y. 230, 240, 66 N. E. 813.

**158 n. 297.** *In re Farrell*, 125 App. Div. 702, 110 N. Y. Supp. 41; *Matter of Fogarty*, 117 App. Div. 583, 102 N. Y. Supp. 776. Jurisdiction will be exercised by the Supreme Court only in special cases where the Surrogate's Court may not have full jurisdiction to decide all questions. *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410. Where the Supreme Court first obtains jurisdiction by the commencement of an action, other proceedings will be stayed. *Matter of Llado's Estate*, 50 Misc. 227, 100 N. Y. Supp. 495. See *Meeks v. Meeks*, 51 Misc. 538, 100 N. Y. Supp. 667 (where the Supreme Court refused to exercise jurisdiction).

**158 n. 298.** "It has been uniformly held that the Supreme Court has jurisdiction to entertain an action brought by an executor, trustee, or cestui que trust, to construe a doubtful or disputed trust clause in a will." *Tonnele v. Wetmore*, 195 N. Y. 436, 442, 88 N. E. 1068 [followed in *Buell v. Gardner*, 83 Misc. 513, 144 N. Y. Supp. 945]. The Supreme Court has no jurisdiction generally over the probate of a will of personal property. *Sherwood v. Sherwood*, 85 Misc. 99, 147 N. Y. Supp. 205.

**159 nn. 308, 309.** Code provisions are now Cons. Laws, c. 23, §§ 71, 270.

**162.** Code sections 232 and 234 are now respectively Cons. Laws, c. 30, §§ 84, 96, 148-150, 264, and c. 30, §§ 79, 153.

**162 n. 320.** Provision is constitutional. *People v. Valentine*, 147 App. Div. 31, 131 N. Y. Supp. 733.

**162 n. 322.** This Code section is amended by Laws 1904, c. 500, by authorizing a trial term in any county to be held in two or more parts, reserving one or more parts "for the trial of actions on sales of personal property, including agreements incident to such sales, for work, labor and services, and material furnished, upon policies of insurance and upon negotiable paper and other instruments transferable by endorsement or order."

**163.** The Code sections 229, 237, 238 are now respectively Cons. Laws, c. 30, §§ 86, 148, 152.

**163 n. 326.** Repealed by Laws 1909, c. 65.

**164, 170-173, 233.** Section 220 of the Code has been in part transferred to Cons. Laws, c. 30, §§ 71, 72, 77, 81, 82, 85, 90.

**165.** Section 235 of the Code, as amended by Laws 1909, c. 65, now reads as follows:

**"§ 235. Powers of justices of the Supreme Court.** Any justice of the Supreme Court has power to hold a special or trial term of the Supreme Court for the whole or any portion of the term; and to act upon any business, which regularly comes before the term in which he is sitting, except where he is personally disqualified from sitting, in a particular action or special proceeding. Each justice must, at all reasonable times, when not engaged in holding court, transact such judicial business as may be done out of court."

**165 § 174.** The Appellate Term, in the second department, is the Supreme Court, and the establishing of such a term is within the power of the legislature. *Leach v. Antwell*, 154 App. Div. 170, 138 N. Y. Supp. 975.

**165 n. 334.** *People ex rel. Patrick v. Frost*, 133 App. Div. 179, 117 N. Y. Supp. 524.

**170 n. 358.** See Cons. Laws, c. 30, § 148, as amended in 1913.

**173 nn. 373-375.** These Code provisions are now Cons. Laws, c. 30, §§ 78, 79, 80, and c. 18, § 33, and c. 56, § 46.

**173 § 186.** Its power of review includes the right to exercise discretion independent of the exercise of it by the lower court. *Pietraroia v. New Jersey & Hudson River Ry., etc., Co.*, 197 N. Y. 434, 91 N. E. 120.

**173.** Appellate Division has no jurisdiction to investigate the judicial opinions or conduct of a justice of the Supreme Court. *Matter of Wilson*, 160 App. Div. 521, 145 N. Y. Supp. 557.

**174 n. 379.** Even by consent, the judge cannot order a reference after his appointment to the Appellate Division. *Owasco Lake Cemetery v. Teller*, 110 App. Div. 450, 96 N. Y. Supp. 985. Thereafter the justice has no power to hear and decide a motion for a nonsuit reserved at the trial at which the case was heard and decided. *Milliman v. New York Cent. & H. R. R. Co.*, 109 App. Div. 139, 95 N. Y. Supp. 1097.

**180 § 193.** County Courts are new courts. *People ex rel. Wogan v. Rafferty*, 154 App. Div. 767, 139 N. Y. Supp. 572.

**181 § 194.** The County Court of Kings County has no jurisdiction of an action against the city of New York. *Maisch v. New York*, 193 N. Y. 460, 86 N. E. 458 [affirming 111 N. Y. Supp. 645]. The decision in the *Maisch* case *supra* is no longer the law. "In 1911, and after that decision was rendered, the Legislature amended section 341 of the Code by adding a clause providing that a domestic corporation any part of whose 'plant or plants, shops, factories or offices is actually located within the county, \* \* \* is deemed a resident of the county.' (Laws of 1911, chap. 68.) It seems clear that this amendment was made with the intention on the part of the Legislature to extend the jurisdiction of County Courts accordingly. The statute must be given a fair and liberal construction to effectuate this intent. As it is conceded that part of the offices of the defendant the city

of New York are located in the county of Queens, it must be held that the County Court of that county had jurisdiction of the cause of action." *Eldred v. New York*, 159 App. Div. 301, 144 N. Y. Supp. 402. Defendant must be a resident of the county, and objection cannot be waived. *Dakin v. Elmore*, 68 Misc. 423, 125 N. Y. Supp. 44.

**182.** No jurisdiction over ejectment suit and for damages for withholding possession. *Piekelko v. Lake View Brewing Co.*, 65 Misc. 365, 119 N. Y. Supp. 847.

**182 n. 402.** This Code provision is now Cons. Laws, c. 30, § 29.

**183.** In the fourth line, after the word "chattel" and before the word "where," the clause "in a case specified in section two hundred and six of the lien law," is added by Laws 1909, c. 65. Want of jurisdiction because of defendant's nonresidence cannot be waived nor can jurisdiction be obtained by consent of the parties. *Perlman v. Gunn*, 41 Misc. 166, 83 N. Y. Supp. 986. Jurisdiction limited to \$2,000 where money judgment demanded. *Owen v. Brown*, 78 Misc. 273, 139 N. Y. Supp. 451.

**183 n. 409.** Claim for interest may be allowed to be stricken out of complaint to bring amount within jurisdiction of court. *National Surety Co. v. Rosenberg*, 158 App. Div. 896, 142 N. Y. Supp. 1043. Prayer for judgment against each of defendants for \$2,000 is within jurisdiction of County Court. *Curran v. Arp*, No. 1, 141 App. Div. 38, 125 N. Y. Supp. 758.

**184 n. 411.** *Weinstein v. Helfendberg*, 78 Misc. 190, 139 N. Y. Supp. 303. The official citation of *Howard Iron Works v. Buffalo Elevating Co.* is 176 N. Y. 1.

**184 n. 413.** The jurisdiction is by Law's 1910 (c. 123) extended to cases of "imbecility arising from old age or loss of memory and understanding or other causes," thereby amending this Code provision. Laws 1896, c. 548, is repealed by Laws 1909, c. 65.

**185 n. 421.** Residence of surety company which gives bonds, see *Perlman v. Gunn*, 41 Misc. 166, 83 N. Y. Supp. 986. This provision was amended in 1911 (c. 68) by adding after the words "articles of association" the clause "or whose principal place of business or any part of its plant or plants, shops, factories or offices" is actually located within the county. This section was further amended in 1914 (c. 350) by adding the following proviso at the end thereof: "Provided, however, that a city which shall include within its boundaries more than one county shall not for the purpose of conferring jurisdiction on a county court be deemed a domestic corporation resident of any county so included." See also ante, **181 § 194.**

**186 n. 423.** *Andrews v. Horton*, 66 Misc. 66, 120 N. Y. Supp. 431.

**188 n. 440.** Section 241 of the Code, repealed by the Judiciary Law (Laws of 1909, chap. 35, sec. 800), is now restored and re-enacted by Laws 1910, c. 575.

**189 n. 451.** Code provision is now Cons. Laws, c. 12, § 51.

**191 n. 466.** Laws 1909, c. 65, adds the following provision:

**"§ 356. Power of county judge when holding court in another county.** During the period that any county judge shall be in a county other than his own, for the purpose of holding courts therein, he may exercise all the powers and perform all the duties of the county judge of such other county, which said last mentioned judge is by law authorized to exercise and perform out of court or in vacation; provided, however, that nothing herein contained shall empower him to perform the duties of surrogate in such other county."

**191 n. 467.** While this Code provision authorizes an ex parte order by a justice of the Supreme Court extending the time to answer in an action brought in the County Court, it does not authorize a modification of such order at the Special Term of the Supreme Court. *Edwards v. Shreve*, 83 App. Div. 165, 82 N. Y. Supp. 514.



**193 n. 474.** *Contra*, *Queens-Nassau Mortg. Co. v. Graham*, 157 App. Div. 489, 142 N. Y. Supp. 589.

**194 n. 479.** As amended by Laws 1909, c. 65, this Code provision now extends to only the first sentence of the paragraph. This Code provision is now in part Cons. Laws, c. 30, §§ 190, 191.

**195 nn. 480, 481.** These Code provisions are now respectively Cons. Laws, c. 11, § 240, c. 30, § 192, and c. 30, §§ 533, 541.

**198 § 205.** Legislature cannot extend territorial jurisdiction beyond city limits. *Darling v. White*, 67 Misc. 366, 124 N. Y. Supp. 846.

**203 n. 523.** The statute merely changed the name of the court and has no effect on proceedings past or pending. *Easthampton Lumber & Coal Co. v. Worthington*, 186 N. Y. 407, 79 N. E. 323.

**203 § 212.** Is a court created by the legislature. *De Leyer v. Britt*, 157 App. Div. 586, 142 N. Y. Supp. 752.

**203 n. 524.** *Edgerley v. Blackburn*, 141 App. Div. 419, 125 N. Y. Supp. 353.

**203 § 213.** City Court of New York has no jurisdiction of actions against city. *O'Connor v. New York*, 191 N. Y. 238, 83 N. E. 979 [affirming 129 App. Div. 875]. City Court has jurisdiction of action by foreign corporation to recover money only. *Woodward Lumber Co. v. General Supply & Const. Co.*, 60 Misc. 367, 113 N. Y. Supp. 628. Court has jurisdiction of an action against a receiver for goods sold to him. *John C. Orr Co. v. Cushman*, 54 Misc. 121, 104 N. Y. Supp. 510. Has jurisdiction of an action of interpleader. *U. S. Mortgage & Trust Co. v. Vermilye*, 72 Misc. 375, 130 N. Y. Supp. 303. Subdivision 3 of section 315 of the Code amended in 1911 so as to raise the limit of the jurisdiction of the City Court of New York in an action to foreclose a lien on a chattel from \$2,000 to \$5,000; and subdivision 4 was similarly amended with

respect to confessions of judgment. This 1911 amendment of § 315 of the Code raising the amount for which judgment may be rendered from \$2,000 to \$5,000 is unconstitutional because it confers greater jurisdiction than is conferred on County Courts. *Lewkowicz v. Queen Aeroplane Co.*, 207 N. Y. 290, 100 N. E. 796 [aff. 154 App. Div. 142, 138 N. Y. Supp. 983, which reversed 77 Misc. 151, 136 N. Y. Supp. 894].

204 n. 528. Has same jurisdiction as Supreme Court of actions by nonresidents against foreign corporations. *Kline v. Imperial Coal & Coke Co.*, 66 Misc. 616, 122 N. Y. Supp. 211.

204 n. 530. See *Schultz v. Teichman Engineering & Const. Co.*, 79 Misc. 357, 140 N. Y. Supp. 429. No jurisdiction where City of New York is a defendant. *Buess v. New York*, 80 Misc. 391, 141 N. Y. Supp. 426.

206 n. 534. *Seeley v. Osborne*, 83 Misc. 409, 145 N. Y. Supp. 237. Judgment limited to \$2,000. *Mills v. Gold*, 79 Misc. 209, 139 N. Y. Supp. 846; *Siegel v. Corvan Co.*, 157 App. Div. 423, 142 N. Y. Supp. 267. Complaint not demurrable because it asks for more than \$2,000. *Lickerman v. Motchan*, 82 Misc. 405, 143 N. Y. Supp. 731. Limitation is merely on amount of recovery. *Miners & Merchants Bk. v. Brady*, 76 Misc. 212, 134 N. Y. Supp. 590.

206 § 214. Has jurisdiction to recover insurance on interpleader. *Katz v. Witt*, 74 Misc. 582, 134 N. Y. Supp. 675. Cannot appoint referee to examine party before trial. *Voicly v. Aiello*, 65 Misc. 539, 120 N. Y. Supp. 913.

206 n. 543. The court is given power to naturalize aliens by amendment of this Code provision in 1911 (c. 569).

207 § 215. Legislature may confer equity jurisdiction especially where it creates an equitable remedy and confers on the court jurisdiction to enforce it. *Schultz v. Teichman Eng. & Const. Co.*, 79 Misc. 357, 140 N. Y. Supp. 429.

207 n. 546. *Lasky v. Coverdale*, 84 Misc. 34, 147 N. Y.

Supp. 1122. Such as an action for redemption. *Oest v. Hendrick*, 76 Misc. 258, 134 N. Y. Supp. 900. Partnership suits, see *Mitchell v. Frank*, 142 N. Y. Supp. 313. Partnership suit held not equitable. *Weiss v. Weiss*, 75 Misc. 644, 133 N. Y. Supp. 1021. The court has no jurisdiction of an action by a trustee in bankruptcy to recover a preference. *Dyer v. Kratzenstein*, 103 App. Div. 404, 92 N. Y. Supp. 1012.

207 n. 549. *Cukor v. Rothman*, 78 Misc. 588, 139 N. Y. Supp. 1015 [rev. in 140 N. Y. Supp. 113, on ground that action was one at law]; *Oppenheimer v. Trebla Realty Co.*, 76 Misc. 452, 134 N. Y. Supp. 1095. What constitutes action for accounting, see *Voicly v. Aiello*, 65 Misc. 539, 120 N. Y. Supp. 913. Suit to recover deposit held not one for an accounting. *Niele v. Stokes*, 61 Misc. 302, 113 N. Y. Supp. 704.

207 n. 550. *Oppenheimer v. Trebla Realty Co.*, 154 App. Div. 593, 139 N. Y. Supp. 894. But where relief sought on motion to interplead is a judgment setting aside a transfer, the City Court is without jurisdiction. *Edwards v. Greenwich Savings Bank*, 59 Misc. 451, 110 N. Y. Supp. 920.

207 n. 552. By an amendment in 1907 of section 320 of the Code of Civil Procedure the City Court is enlarged so as to consist of ten justices.

210 § 221. A new Code section (319a) was added by amendment in 1913 (c. 210), as to removal of causes in certain cases from the City Court of New York to the Supreme Court, as follows: "The Supreme Court, at a term held in the first judicial district, must, on the motion of any party, by an order made at any time before the entry of judgment, remove to itself an action brought in the City Court of the City of New York in the following cases:

"1. An action to foreclose or enforce a lien, for a sum exceeding two thousand dollars, exclusive of interest, upon one or more chattels.

“2. An action wherein the complaint demands judgment for a sum of money only, exceeding two thousand dollars, exclusive of interest and costs as taxed; except where the action is brought upon a bond or undertaking given in an action or special proceeding in the same court, or before a justice thereof; or to recover damages for a breach of promise of marriage, or where it is a marine cause, as that expression is defined in section three hundred and seventeen of this code.

“3. An action to recover one or more chattels the aggregate value of which exceeds two thousand dollars.

“Upon the entry of the order of removal in the office of the clerk of the county of New York, the city court shall proceed no further therein, and the clerk of the city court must forthwith deliver to the clerk of the county of New York all papers filed therein, and certified copies of all minutes and entries relating thereto, which must be filed, entered or recorded, as the case requires, in the office of the clerk of the county of New York, and thereupon the supreme court shall proceed in said action as though said action had been commenced in said supreme court, and all proceedings had in the city court prior to the entry of said order of removal shall be of like force and effect as though had in the Supreme Court.” This new provision seems to be the result of the decision in *Lewkowitz v. Queen Aeroplane Co.*, 207 N. Y. 290, 100 N. E. 796, declaring unconstitutional the amendments of sections 315 and 316 of the Code in 1911 increasing the jurisdiction of the City Court of New York from \$2,000 to \$5,000 in certain actions.

The amendment (c. 211) also provides that, “Whenever judgment has been or shall be entered in the City Court of the city of New York” in any one or more of such cases, “any party to such action, at any time after the entry of such judgment, may apply to the said city court to have such judgment vacated, and thereupon the said city court

may in its discretion vacate such judgment. Any case, wherein a judgment has been so vacated, may be removed to the supreme court in the first judicial district, as provided in section three hundred and nineteen-a." New trial necessary after removal under § 319a of the Code. *Siegel v. Corvan Co.*, 157 App. Div. 423, 142 N. Y. Supp. 267. Under 1913 amendment of Code (§ 319a) suit for amount in excess of jurisdiction of City Court may be removed to Supreme Court. *Reichert v. Walter*, 80 Misc. 402, 141 N. Y. Supp. 266.

**210 § 223.** Subdivision 4 of section 338 formerly provided that "an order duly made in an action pending in the court requiring the performance of an act by a party thereto, or an officer, may be served upon a person bound to obey the order, and his obedience thereto may be required, in any part of the State." The phrase "in an action" is changed to "in an action or special proceeding" by amendment in 1910 (c. 583)

**211 n. 573.** An order requiring the attendance of the judgment debtor in supplementary proceedings is an order in an action which may be served in any part of the state. *Deane v. Sire*, 48 Misc. 606, 95 N. Y. Supp. 556. It is submitted that this decision is wrong in so far as it holds that supplementary proceedings are not special proceedings.

**211 § 225.** Note of issue, sufficiency of, see *Mintz v. Goldbaum*, 122 N. Y. Supp. 215.

**211 § 226.** Time to appeal, see *Ost v. Salmanowitz*, 54 Misc. 547, 104 N. Y. Supp. 849.

**212 § 228.** The jurisdiction of and procedure in Surrogates' Courts is changed and modified by many amendments, especially those of 1914.

**213 n. 582.** Surrogate's Court possesses only such jurisdiction as is conferred on it by statute. *Baldwin v. Rice*, 44 Misc. 64, 71, 89 N. Y. Supp. 743.

**213 § 229.** Jurisdiction, see *Quayle v. State of New*

York, 192 N. Y. 47, 84 N. E. 583 [affirming 124 App. Div. 81]; *Elmore & Hamilton Cont. Co. v. State*, 62 Misc. 58, 115 N. Y. Supp. 1071; *Nussbaum v. State*, 119 App. Div. 755, 104 N. Y. Supp. 527; *Remington v. State*, 116 App. Div. 522, 101 N. Y. Supp. 952. It seems that the trial practice in the Court of Claims is the same as in the Supreme Court. So held as to failure to move for nonsuit at close of evidence as precluding review of questions of law on appeal. *Spencer v. State*, 187 N. Y. 484, 80 N. E. 375.

213 n. 583. Laws 1906, c. 692, amends the statute.

221 n. 593. Code provision is now Cons. Laws, c. 18, § 29, and c. 30, § 23.

222. Code provisions are now Cons. Laws, c. 30, §§ 17, 18, 19, 21, 471.

222 n. 958. See *People ex rel. Welch v. Bard*, 209 N. Y. 304, 103 N. E. 140.

223 § 237. In absence of malice, judge not liable for false imprisonment. *Bowman v. Seaman*, 152 App. Div. 690, 137 N. Y. Supp. 568; *Starrett v. Connolly*, 150 App. Div. 859, 135 N. Y. Supp. 325; *Baldwin v. Rice*, 147 App. Div. 347, 131 N. Y. Supp. 785. Not liable for false imprisonment. *Sweeney v. O'Dwyer*, 197 N. Y. 499, 90 N. E. 1129.

225 § 241. A justice of the Supreme Court who is temporarily designated to serve on the Appellate Division before he has decided a case tried before him at Special Term may decide such case after the temporary designation is revoked. *Irving Nat. Bank v. Moynihan*, 78 App. Div. 141, 79 N. Y. Supp. 528. But where a justice of the Supreme Court, after he has announced his decision in an equity case, is designated to the Appellate Division, he cannot thereafter sign and file his decision, but there must be a new trial; and where appointed for five years the cause cannot await the time when his designation expires. *Williamson v. Randolph*, 111 App. Div. 539, 97 N. Y. Supp. 949. See also ante, 174 n. 379.

225 n. 614. See *Jewett v. Schmidt*, 108 App. Div. 322, 95 N. Y. Supp. 631.

226 n. 623. This Code provision does not refer exclusively to county officers. It includes a justice of the Supreme Court. *Matter of Town of Hadley*, 44 Misc. 265, 89 N. Y. Supp. 910.

227 n. 624. To same effect, see *F. W. Dodge & Co. v. Albers*, 54 Misc. 37, 104 N. Y. Supp. 497.

228. The Code provisions as to disqualification are now Cons. Laws, c. 30, §§ 15, 20, 22.

228 n. 628. *McAlpin v. Stoddard*, 54 Misc. 647, 105 N. Y. Supp. 9. This provision was amended in 1910 (c. 562) so as to make it applicable to "the counties within the first and second judicial districts," thereby taking in, in addition to New York and Kings counties, the counties of Richmond, Queens, Nassau and Suffolk.

228 § 244. Consent of parties cannot confer jurisdiction where judge is disqualified. *People v. Whitridge*, 144 App. Div. 493, 129 N. Y. Supp. 300.

228 n. 631. This does not prevent a judge from hearing and determining an action relating to a judgment procured in an action where the judge acted as attorney, where the second action was not brought until several years afterwards and then by other attorneys, and the relation of attorney and client existing in the first case had been terminated on the rendition of judgment therein. *Keeffe v. Third Nat. Bank*, 177 N. Y. 305, 69 N. E. 593. The words "cause or matter," used in this Code provision refer only to actions or special proceedings in which a judge might sit or take part, the word "cause" meaning a cause of action and the word "matter" referring to a special proceeding. *Id.* This Code provision applies to criminal as well as to civil trials, and it is held in a criminal case that where a judge had acted as attorney for an alleged accomplice of the defendant, and, as such,

had consulted with the defendant about the indictments pending against him, he is disqualified though the formal relation of lawyer and client never existed between the judge and defendant. *People v. Haas*, 105 App. Div. 119, 93 N. Y. Supp. 790. Libel published about judge, see *Wilcox v. Supreme Council of the Royal Arcanum*, 66 Misc. 253, 123 N. Y. Supp. 83.

229 n. 637. As where interest has been cut off by foreclosure. *People v. Whitridge*, 144 App. Div. 493, 129 N. Y. Supp. 300.

230 n. 642. This Code provision is now Cons. Laws, c. 30, §§ 15, 22.

230 n. 642. The phrase "cause or matter," as used in this Code provision, means the particular action or special proceeding to be tried. *Keeffe v. Third Nat. Bank*, 177 N. Y. 305, 69 N. E. 593.

230 n. 644. See also *People v. Patrick*, 183 N. Y. 52, 75 N. E. 963.

230 n. 645. It is not enough that the judge and plaintiff's attorney married sisters. *Zambetti v. Garton*, 113 N. Y. Supp. 804.

232 n. 654. This Code provision is now Cons. Laws, c. 30, § 16.

236 n. 686. See *People ex rel. Arnold v. Skene*, 194 N. Y. 186, 87 N. E. 432. Cannot be issued at trial term. *People v. Supreme Lodge K. & L. of Honor*, 126 App. Div. 86, 110 N. Y. Supp. 148.

239 n. 701. See *People ex rel. Arnold v. Skene*, 194 N. Y. 186, 87 N. E. 432.

239 nn. 703, 704. *Matter of Munson*, 95 App. Div. 23, 88 N. Y. Supp. 509. The body of the order may be looked into to see whether it was made by a court or by a judge. *Id.* See also *Edwards v. Shreve*, 83 App. Div. 165, 82 N. Y. Supp. 514. See also vol. 1, p. 619.

240 n. 708. A stipulation, on settlement of the cause of



action, for discontinuance, signed by plaintiff personally, can only be made effectual by an application to the court on notice to his attorney. *Kuehn v. Syracuse Rapid Transit R. Co.*, 104 App. Div. 580, 93 N. Y. Supp. 883 [reversed on other grounds in 183 N. Y. 456].

**241** n. 711. Code provision is now a part of Cons. Laws, c. 30, § 470.

**242** nn. 724, 725. Code provisions are now Cons. Laws, c. 40, § 273.

**243.** Construction of rules as to admission to bar, see *In re New York Law School*, 190 N. Y. 215, 83 N. E. 17. The Code provisions are now Cons. Laws, c. 30, §§ 53, 56, 88, 264, 460-467, and c. 18, § 30.

**243.** Corporation cannot practice law. *Matter of Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15. Penal Code, § 280 excepts corporations organized for charitable or benevolent purposes from the prohibition against practicing law. *Matter of Associated Lawyers Co.*, 134 App. Div. 350, 119 N. Y. Supp. 77.

**243** § 283. For rules as to admission to bar, see Rule 1 of the General Rules of Practice as amended in 1910 and in 1913.

**243** § 284. Persons not admitted to bar cannot contract to render legal services. *Buxton v. Lietz*, 139 N. Y. Supp. 46.

**244** n. 729. See also Rule 1 of the General Rules of Practice, as amended in 1910 and 1913. See *Matter of Backus*, 151 App. Div. 813, 136 N. Y. Supp. 484. English barristers entitled to admission. *Matter of Wray*, 157 App. Div. 905, 142 N. Y. Supp. 186.

**246** n. 741. Person who omits to file certificate cannot practice or hold himself out as a lawyer. *Thompson v. Stiles*, 44 Misc. 334, 89 N. Y. Supp. 876.

**248** n. 757. *Main Electric Co. v. Cohen*, 72 Misc. 30, 129 N. Y. Supp. 66.

**249.** An attorney issuing a writ of attachment is liable

to the sheriff for poundage fees. *Gadski-Tauscher v. Graff*, 44 Misc. 418, 89 N. Y. Supp. 1019. Where an attorney recovers a judgment for his client, and which was paid by the unsuccessful party to the attorney pending an appeal, upon the reversal of the judgment, the attorney's client, who had received the benefit of the payment by being credited upon a bill rendered to him by the attorney, must restore or account for the money, although the client and the attorney had settled upon the basis that the attorney had received the amount of the judgment, and credited it to his client in the bill rendered, and upon which the settlement was made. *Royal Baking Powder Co. v. Hoagland*, 180 N. Y. 35, 72 N. E. 634.

249 n. 767. In order to recover from an attorney, costs paid to him, the plaintiff must show not only that costs in excess of legal costs were received by the attorney, but also that he had them in his possession after the making of the order which reduced the amount of the costs. If, before the making of such order, the attorney paid out the costs on the account of his client, or appropriated them to pay himself for disbursements made by himself for his client, he cannot be required to restore them. The action should be against the client, and not against the attorney. Of course, if the attorney obtained payment of the costs by deceit, he could be required to restore them, irrespective of how he had disposed of them. *Rickert v. Pollock*, 46 Misc. 275, 92 N. Y. Supp. 89.

250 § 296. The Code provisions as to disbarment are now Cons. Laws, c. 30, §§ 88, 476, 477, 478, and c. 40, §§ 273, 274, 275, 276 and 278. "By chapter 253 of the Laws of 1912 subdivision 2 of section 88 of the Judiciary Law was amended so as to read as follows: 'The Supreme Court shall have power and control over attorneys and counsellors at law, and the Appellate Division of the Supreme Court in each department is authorized to censure, suspend from prac-

tice or remove from office any attorney and counsellor at law admitted to practice as such who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the Appellate Division of the Supreme Court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.' The Appellate Division of the Supreme Court had long exercised such jurisdiction to discipline attorneys and counsellors at law who were guilty of professional misconduct. By the statute as amended in 1912 the legislature simply gives expression to a more extended power and jurisdiction in the Appellate Division of the Supreme Court than was expressed in the statutes as they existed prior to such amendment." *Matter of Robinson*, 209 N. Y. 354, 103 N. E. 160. Under 1912 amendment of the Judiciary Law, the grounds stated for disbarment apply without regard to whether in the performance of the act the attorney was acting for himself or for another. *Matter of Heymann*, 156 App. Div. 73, 140 N. Y. Supp. 1065. Grounds for disbarment, see *Matter of Haskell*, 150 App. Div. 837, 135 N. Y. Supp. 249; *Matter of Robinson*, 151 App. Div. 589, 136 N. Y. Supp. 548; *Matter of Flannery*, 150 App. Div. 369, 135 N. Y. Supp. 612; *Matter of Mendelsohn*, 150 App. Div. 445, 135 N. Y. Supp. 438; *Matter of Voxman*, 148 App. Div. 286, 132 N. Y. Supp. 217; *Matter of Harrington*, 146 App. Div. 219, 130 N. Y. Supp. 920; *Matter of Steckler*, 146 App. Div. 827, 131 N. Y. Supp. 766; *Matter of Pascal*, 146 App. Div. 836, 131 N. Y. Supp. 833; *Matter of Greestein*, 140 App. Div. 547, 125 N. Y. Supp. 791; *Matter of Joseph*, 135 App. Div. 589, 120 N. Y. Supp. 793. Forgery of client's name and embezzlement not excused by youth of attorney. *Matter of Rosenthal*, 137 App. Div. 772, 122 N. Y. Supp. 471. What constitutes misconduct, see *Matter of Alexander*,

137 App. Div. 770, 122 N. Y. Supp. 479. Depositing client's money in attorney's personal account is ground. *Matter of Gifuni*, 137 App. Div. 351, 121 N. Y. Supp. 1131. False representations of retainer is ground. *Matter of Andrews*, 137 App. Div. 353, 121 N. Y. Supp. 935. Buying witness to testify is ground. *Matter of Schafiro*, 144 App. Div. 1, 128 N. Y. Supp. 852. Cheating client is ground. *Matter of Logan*, 143 App. Div. 225, 128 N. Y. Supp. 134. Perjury is ground. *Matter of Klatzkie*, 142 App. Div. 352, 126 N. Y. Supp. 842. Attempt to bribe an officer. *Matter of Billington*, 156 App. Div. 63, 141 N. Y. Supp. 16. Filing forged satisfaction of judgment. *Matter of Heymann*, 156 App. Div. 73, 140 N. Y. Supp. 1065. False certificate to obtain admission of his clerk to practice. *Matter of Zatulove*, 156 App. Div. 79, 141 N. Y. Supp. 75. Perjury in procuring admission to bar. *Matter of Singer*, 156 App. Div. 85, 141 N. Y. Supp. 74. Concealment of imprisonment for perjury. *Matter of Kristelier*, 154 App. Div. 556, 139 N. Y. Supp. 64. False issuance of certificate as commissioner of deeds. *Matter of Gotthein*, 153 App. Div. 779, 138 N. Y. Supp. 636. Inducing client's wife to commit adultery. *Matter of Bayles*, 156 App. Div. 663, 141 N. Y. Supp. 1052. Approving payment of reasonable expenses of an investigation to ascertain names of witnesses not ground. *Matter of Robinson*, 209 N. Y. 354, 103 N. E. 160 [aff. 151 App. Div. 589, 136 N. Y. Supp. 548]. Knowingly verifying false answer held ground. *Matter of Greenbaum*, 161 App. Div. 558. Misappropriation of moneys obtained from client by false representations held to authorize disbarment. *Matter of Avrutis*, 161 App. Div. 549. Permitting disbarred attorney to practice in name of another is ground for disbarring the latter. *Matter of Quitman*, 152 App. Div. 865, 137 N. Y. Supp. 1069. An attorney who practices under the name of a firm one of whom is dead and the other disbarred is properly disbarred. *Matter of Kaffenburgh*, 188 N. Y. 49 [affirming

115 App. Div. 346, 101 N. Y. Supp. 507]. Refusal of an attorney to answer questions, as a witness, on the ground that the answers might incriminate him, is not ground for disbarment. *Matter of Kaffenburgh*, 188 N. Y. 49, 80 N. E. 570. Aiding a client out on bail to escape as unprofessional conduct sufficient to cause disbarment, see *Matter of Kaffenburgh*, 188 N. Y. 49, 80 N. E. 570 [affirming 115 App. Div. 346, 101 N. Y. Supp. 507]. Deceit in suppression of facts on admission to bar is ground. *Matter of Marx*, 115 App. Div. 448, 101 N. Y. Supp. 680. The court has jurisdiction to disbar an attorney for misconduct committed outside of the state and in the United States court, and with respect to the process of that court. Disbarment is proper where the attorney is guilty of perjury and subornation of perjury in verifying a complaint in an action. *In re Lamb*, 105 App. Div. 462, 94 N. Y. Supp. 331. A surrogate who practices as an attorney in violation of the Constitution cannot be disbarred. *Matter of Silkman*, 88 App. Div. 102, 84 N. Y. Supp. 1025.

250 n. 772. See *Matter of Manheim*, 113 App. Div. 136, 99 N. Y. Supp. 87; *Matter of Freedman*, 113 App. Div. 327, 99 N. Y. Supp. 135.

250 n. 773. There is malpractice, which is cause for disbarment where an attorney settled with the party he was employed to sue, for his own compensation, and then advised his clients to settle with the party the attorney was engaged to sue. *Matter of Clark*, 184 N. Y. 222, 77 N. E. 1.

250 n. 776. See *Matter of Lent*, 152 App. Div. 868, 137 N. Y. Supp. 1052; *Matter of Shamroth*, 148 App. Div. 828, 133 N. Y. Supp. 514; *Matter of Spencer*, 143 App. Div. 229, 128 N. Y. Supp. 168; *Matter of Prinstein*, 142 App. Div. 807, 127 N. Y. Supp. 629; *Matter of Cohn*, 141 App. Div. 511, 126 N. Y. Supp. 218; *Matter of Lowy*, 140 App. Div. 537, 125 N. Y. Supp. 777; *Matter of Keuchtwanger*, 139

App. Div. 36, 123 N. Y. Supp. 798; *Matter of Rockmore*, 139 App. Div. 71, 123 N. Y. Supp. 928; *Matter of Flower*, 138 App. Div. 102, 122 N. Y. Supp. 886; *Matter of Ironside*, 128 N. Y. Supp. 125.

**251.** Grounds for censure, see *Matter of Boehm*, 150 App. Div. 443, 135 N. Y. Supp. 42; *Matter of Schleimer*, 150 App. Div. 507, 135 N. Y. Supp. 406; *Matter of Cohn*, 150 App. Div. 470, 134 N. Y. Supp. 1103; *Matter of Newman*, 158 App. Div. 471, 143 N. Y. Supp. 590; *Matter of Mulligan*, 153 App. Div. 883, 137 N. Y. Supp. 1131; *Matter of Kisselburgh*, 153 App. Div. 884, 137 N. Y. Supp. 1060; *Matter of Barnard*, 151 App. Div. 580, 136 N. Y. Supp. 185; *Matter of Sheehan*, 141 App. Div. 510, 126 N. Y. Supp. 200; *Matter of Doyle*, 138 App. Div. 99, 122 N. Y. Supp. 1000; *Matter of Tracy*, 135 N. Y. Supp. 29; *Matter of Henderson*, 131 N. Y. Supp. 544. Submitting misleading affidavit, calculated to deceive the court, held ground for disciplining attorney. *Matter of Wagener*, 161 App. Div. 546. Motion to discipline attorney denied although he deposited moneys of his client in his personal bank account. *Matter of Clarke*, 161 App. Div. 630. Suspended for two years. *Matter of Goodman*, 199 N. Y. 143, 92 N. E. 211; *Matter of Lash*, 150 App. Div. 467, 135 N. Y. Supp. 370. Attorney suspended from practice for two years where he attempted to retain a portion of verdict in violation of his contract of retainer. *Matter of Smith*, 161 App. Div. 638. Suspended for one year. *Matter of Imperatori*, 152 App. Div. 86, 136 N. Y. Supp. 675. *Matter of Herbst*, 158 App. Div. 601, 143 N. Y. Supp. 890; *Matter of Rich*, 158 App. Div. 473, 143 N. Y. Supp. 623; *Matter of Beare*, 158 App. Div. 469, 143 N. Y. Supp. 595; *Matter of Slawson*, 158 App. Div. 467, 143 N. Y. Supp. 594; *Matter of Buchlor*, 155 App. Div. 246, 140 N. Y. Supp. 324; *Matter of Chadsey*, 141 App. Div. 458, 126 N. Y. Supp. 456; *Matter of Robinson*, 140 App. Div. 329, 125 N. Y. Supp. 193; *Matter of Gluck*, 139 App. Div. 894, 123 N. Y. Supp. 857.

Suspended for six months. *Matter of Greenberg*, 131 N. Y. Supp. 531. Inexperience as lessening punishment to suspension instead of disbarment. *Matter of Abrahams*, 158 App. Div. 595, 143 N. Y. Supp. 927. Reinstatement, see *Matter of Oppenheim*, 155 App. Div. 889, 139 N. Y. Supp. 1053. Section 77 of the Code is amended by Laws 1907 so as to read that the last four sections apply to a person prosecuting an action in person "and to a corporation engaged in the business of conducting litigation and providing counsel therefor," who "or which" does an act which an attorney or counsel is therein forbidden to do.

251 n. 790. *In re Leonard*, 127 App. Div. 493, 111 N. Y. Supp. 905; *In re Boland*, 127 App. Div. 746, 111 N. Y. Supp. 932; *Matter of Goodman*, 158 App. Div. 465, 143 N. Y. Supp. 577. Insisting on truth of testimony known to be false is deceit. *Matter of Hardenbrook*, 135 App. Div. 634, 121 N. Y. Supp. 250, 12 Civ. Pro. (N. S.) 8.

252. The provisions of the Penal Code cited are now Cons. Laws, c. 40, §§ 277, 278.

252 n. 792. See *Matter of Rothschild*, 140 App. Div. 583, 125 N. Y. Supp. 629.

252 n. 795. *Matter of Welch*, 156 App. Div. 470, 141 N. Y. Supp. 381; *Matter of Clark*, 184 N. Y. 222, 77 N. E. 1 [affirming 108 App. Div. 150, 95 N. Y. Supp. 388]. Section 74 is amended by Laws 1907 by adding to the words "for the purpose of bringing an action thereon" the clause "or of representing the claimants in the pursuit of any civil remedy for the recovery thereof." Punishment, suspension for one year. *In re Shay*, 133 App. Div. 547, 118 N. Y. Supp. 146.

252 n. 797. Regularity of conviction cannot be questioned. *Matter of Patrick*, 136 App. Div. 450, 120 N. Y. Supp. 1006. Plea of guilty to an indictment for a felony. *Matter of Newell*, 157 App. Div. 907, 142 N. Y. Supp. 185. "By subdivision 2 of section 88 of the Judiciary Law (Consol. Laws, chap. 30 [Laws of 1909, chap. 35], as amd. by Laws of 1912,

chap. 253, and Laws of 1913, chap. 720) 'the Appellate Division of the Supreme Court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice as such who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice;' and by subdivision 3 of section 88: 'Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the Appellate Division of the Supreme Court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be stricken from the roll of attorneys.' Under subdivision 2 of section 88 the disbarment of an attorney who has committed a crime would not be dependent upon his conviction for that offense as it is under subdivision 3, and when an attorney is charged with the commission of a crime it is the duty of the Appellate Division to investigate and, if the charge is proved, disbar him. The fact that he has not been indicted or convicted is not a defense in proceedings of this character, as then, no matter what crime an attorney had committed, if he was not prosecuted criminally, he could still remain a member of the bar. This court has no control over criminal prosecutions, but it is charged with the duty of preventing criminals from continuing members of the bar. While this court, when an attorney has been indicted, may suspend the proceedings until after the trial on the indictment, yet when an attorney has not been indicted the fact that he could be if the charge is true is no reason why the court should not investigate the charge." *Matter of Stanton*, 161 App. Div. 555.

253 n. 800. But see *In re Bauder*, 128 App. Div. 346, 112 N. Y. Supp. 761.

253 § 297. Procedure, see *Matter of Wilson*, 158 App. Div. 607, 143 N. Y. Supp. 852; *Matter of Rollins*, 154 App. Div.



924, 139 N. Y. Supp. 1142. Not a criminal proceeding so as to warrant presumption of innocence. *Matter of Spencer*, 143 App. Div. 229, 128 N. Y. Supp. 168. Adjournments, see *Matter of Kenney*, 155 App. Div. 890, 140 N. Y. Supp. 314. As special proceeding, civil in character, so that commission may issue to take testimony abroad. *Matter of Spencer*, 137 App. Div. 330, 122 N. Y. Supp. 190. Good conduct for two years as ground for reinstatement, see *In re Clark*, 128 App. Div. 348, 112 N. Y. Supp. 777.

253 n. 805. *Matter of Brooklyn Bar Ass'n*, 92 App. Div. 612, 86 N. Y. Supp. 1130.

254. Judicial notice of many years' practice at the bar, see *Matter of Lord*, 154 App. Div. 949, 139 N. Y. Supp. 1131.

254 n. 807. Cannot act on testimony taken before a federal court. *In re Josepp*, 125 App. Div. 544, 109 N. Y. Supp. 1018.

254 n. 808. Reference ordered. *Matter of Barnard*, 129 N. Y. Supp. 939.

254 n. 813. See *Matter of Moffett*, 154 App. Div. 929, 139 N. Y. Supp. 545. Necessity for corroboration of testimony of participant in the wrongdoing, see *Matter of Hardenbrook*, 135 App. Div. 634, 121 N. Y. Supp. 250, 12 Civ. Pro. (N. S.) 8.

255 § 301. Clause in retainer prohibiting the client from settling the litigation without the consent of the attorney is void. *In re Snyder*, 190 N. Y. 66, 82 N. E. 742 [reversing 119 App. Div. 277].

255 n. 818. See *McDonald v. De Vito*, 118 App. Div. 566, 103 N. Y. Supp. 508; *Altkrug v. Horowitz*, 111 App. Div. 420, 97 N. Y. Supp. 716. To create the relation there need be no formal written instrument. *Carlisle v. Barnes*, 102 App. Div. 573, 92 N. Y. Supp. 917. To establish this relation of attorney and client, it is not necessary that the attorney should have appeared as attorney in legal proceedings. Where it appears that an attorney is consulted to extricate

a person from his difficulties, and that the relation commenced because of the position held by the attorney, and the attorney undertakes to act for the person consulting him, the relation of attorney and client exists. *Sheehan v. Erbe*, 103 App. Div. 7, 92 N. Y. Supp. 862.

**255 n. 819.** A contract of retainer, drawn by the attorney, should be strictly construed against him. *McIlvaine v. Steinson*, 90 App. Div. 77, 85 N. Y. Supp. 889.

**256 n. 823.** To bind a client with the knowledge of his attorney as to the existence of an incumbrance, which knowledge the attorney had acquired in some other transaction, not relating to the business of his client, the burden is on the person claiming such notice to show that knowledge of the instrument was present in the mind of the attorney at the time he acted for his client. *Mathews v. Damainville*, 100 App. Div. 311, 91 N. Y. Supp. 524.

**256 § 303.** If proceeding is no longer pending, and relation has ceased, court cannot compel disclosure. *Matter of Trainor*, 146 App. Div. 117, 130 N. Y. Supp. 682.

**256 n. 828.** Defendant may, before trial, obtain an order requiring plaintiff's attorney to furnish plaintiff's address. *Bohling v. Bronson*, 115 N. Y. Supp. 29. Defendant's attorney may be compelled by order to furnish plaintiff the address of defendant to enable plaintiff to serve the latter with an order in the pending action. *O'Connor v. O'Connor*, 62 Misc. 53, 115 N. Y. Supp. 965.

**256 n. 829.** The relationship must exist and the disclosure must be sought in the action in which the attorney purports to represent the client. And the attorney cannot be compelled to pay the expenses of a reference to take his deposition concerning the address of alleged clients. *In re Malcolm*, 129 App. Div. 226, 113 N. Y. Supp. 666.

**257 n. 832.** Will be refused after judgment entered and no appeal taken. *Levy v. Coy, Hunt & Co.*, 64 Misc. 39, 117 N. Y. Supp. 949.

257 n. 835. *Sheehan v. Erbe*, 103 App. Div. 7, 92 N. Y. Supp. 862; *Kissam v. Squires*, 102 App. Div. 536, 92 N. Y. Supp. 873; *Bingham v. Sheldon*, 101 App. Div. 48, 91 N. Y. Supp. 917. So held where action was by assignee of attorney. *Goldberg v. Goldstein*, 87 App. Div. 516, 84 N. Y. Supp. 782. The rule should not be rigorously applied where, owing to the death of the attorney, it is impossible for his representatives to make "full or plenary proof." *Boyd v. Daily*, 85 App. Div. 581, 587, 83 N. Y. Supp. 539. Where an attorney for an estate also acts as attorney for the purchasers of a judgment against the estate, and the judgment was purchased at a discount though considered enforceable at its face, the administrators of the estate are entitled to have it satisfied by payment of the amount paid for it with interest. *Hare v. De Young*, 39 Misc. 366, 79 N. Y. Supp. 868. The exception as laid down in *Clifford v. Braun* is followed in *Boyd v. Daily*, 85 App. Div. 581, 586, 83 N. Y. Supp. 539.

257 § 306. In an action by a client against his attorney for a violation of duty in settling a claim for some \$800 for \$250, without authority, it is error to instruct that "when negligence has been proved, if you find there was any in consequence of which a client has lost his case, it is not incumbent on the client to show that but for the negligence he would have succeeded in the action," where plaintiff neither alleged nor proved the value of the claim nor that it could have been collected in excess of the sum received by the attorney. *Vooth v. McEachen*, 181 N. Y. 28, reversing 91 App. Div. 30, 86 N. Y. Supp. 431. In an action against an attorney for negligence in loaning plaintiff's money, the burden is not on the attorney to establish that the transaction was fair and honest, since such rule applies only where the attorney obtains some property or property rights from his client. *Schreiber v. Heath*, 103 App. Div. 364, 92 N. Y. Supp. 1043. An attorney who fails to exercise the skill ordinarily possessed by persons with common capacity

engaged in the same business in loaning money on property is liable to his client for the amount of the loss sustained by his negligence. *Kissam v. Squires*, 102 App. Div. 536, 92 N. Y. Supp. 873.

**258** n. 839. *Montrose v. Baggott*, 161 App. Div. 494, 146 N. Y. Supp. 649. *Rapuzzi v. Stetson*, 160 App. Div. 150, 145 N. Y. Supp. 455. See *Flynn v. Judge*, 149 App. Div. 278, 133 N. Y. Supp. 794.

**258** § 307. Death of attorney, before rendition of all the services, where contract is not entire, does not preclude a recovery for services previously rendered and for which compensation had become due and payable at the rate stipulated. *Boyd v. Daily*, 85 App. Div. 581, 587, 83 N. Y. Supp. 539. On motion to require an attorney to prosecute an action, an order of reference to determine the amount to which the attorney is entitled as fees should not be made, since such matter is properly the subject of a separate motion. *Luikert v. Luikert*, 102 App. Div. 53, 92 N. Y. Supp. 97. Retainer agreement construed most strongly against the attorney. *Samuels v. Simpson*, 144 App. Div. 466, 129 N. Y. Supp. 534; *Butts v. Carey*, 143 App. Div. 356, 128 N. Y. Supp. 533. An attorney who represents adverse interests or undertakes to discharge conflicting duties is not entitled to compensation from either party. *Eisemann v. Hazard*, 161 App. Div. 703, 146 N. Y. Supp. 685. Right to recover amount of promised retainer where no services rendered, see *Severance v. Bizallion*, 67 Misc. 103, 121 N. Y. Supp. 627.

**258** n. 840. Evidence insufficient to set aside retainer as invalid, because procured by promise to pay client a valuable consideration, see *O'Neill v. Campbell*, 118 App. Div. 64, 103 N. Y. Supp. 150. A petition, under section 66 of the Code, by a client, to fix the fees of her attorney, does not lie where there is a contract agreement therefor. So held where judgment was recovered under an agreement that the

attorney should have fifty per cent. and thereafter the judgment debtor becomes insolvent and the client desired to accept less than one-half in satisfaction of the judgment. *Serwer v. Serwer*, 91 App. Div. 538, 86 N. Y. Supp. 838. The Code provision is now Cons. Laws, c. 30, §§ 474, 475. See Cons. Laws, c. 30, § 474, as am'd by Laws 1912, c. 229, as to agreements between an attorney and a guardian of an infant.

**259.** Liability of husband for attorney's services rendered to the wife as attorney in an action for separation, see *Damman v. Bancroft*, 43 Misc. 678, 88 N. Y. Supp. 386. Where there is a percentage contract, and the attorney is dismissed after he has made material progress in the case, and a recovery is had, an action lies for the breach of the contract of retainer, and the attorney is not restricted to a recovery upon a quantum meruit. *Martin v. Camp*, 161 App. Div. 610, 147 N. Y. Supp. 1126.

**259 n. 841.** *Blaikie v. Post*, 137 App. Div. 648, 122 N. Y. Supp. 292; *Matter of Holland's Estate*, 110 App. Div. 799, 97 N. Y. Supp. 202. See *Ransom v. Ransom*, 70 Misc. 30, 127 N. Y. Supp. 1027; *Matter of Friedman*, 136 App. Div. 750, 121 N. Y. Supp. 426; *Burke v. Baker*, 111 App. Div. 422, 97 N. Y. Supp. 768. An agreement to pay an attorney ten per cent. of any sum received as a settlement, by disinherited persons contesting a will, is not unconscionable. *Ransom v. Cutting*, 188 N. Y. 447, 81 N. E. 324 [affirming on this point 112 App. Div. 150, 98 N. Y. Supp. 282]. Forty per cent. is not unconscionable. *Murray v. Waring Hat Mfg. Co.*, 142 App. Div. 514, 127 N. Y. Supp. 78. When amount unconscionable, see *Ransom v. Ransom*, 147 App. Div. 835, 133 N. Y. Supp. 173.

**259 n. 845.** *Caccia v. Isecke*, 123 App. Div. 779, 108 N. Y. Supp. 542; *Obermeyer & Liebman v. Adisky*, 123 App. Div. 272, 107 N. Y. Supp. 949; *Earley v. Whitney*, 106 App. Div. 399, 94 N. Y. Supp. 728; *Barry v. Third Ave.*

R. Co., 87 App. Div. 543, 84 N. Y. Supp. 830. The client may satisfy a judgment awarding him costs. *Earley v. Whitney*, 106 App. Div. 399, 94 N. Y. Supp. 728. A contract of retainer to pay a certain per cent. "of whatever amount they may so collect for me" covers the costs taxed in the action as well as the damages recovered to the amount of the fixed per cent., though the costs do not belong in gross to the attorney. *McIlvaine v. Steinson*, 90 App. Div. 77, 85 N. Y. Supp. 889. Deducting from amount due, see *Ransom v. Ransom*, 70 Misc. 30, 127 N. Y. Supp. 1027.

259 n. 846. Followed in *Smith v. Cayuga Lake Cement Co.*, 107 App. Div. 525, 95 N. Y. Supp. 236.

260 n. 848. Followed in *In re Robbins*, 61 Misc. 114, 112 N. Y. Supp. 1032.

261. The client may dismiss his attorney at any time. *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. Supp. 1059. Client may discharge attorney arbitrarily, although there is a contract for a contingent fee, as he is liable only on a quantum meruit for services theretofore rendered. *Andrewes v. Haas*, 160 App. Div. 421, 144 N. Y. Supp. 1060.

261 § 309. Authority ends with entry of judgment. *Bond v. National Surety Co.*, 79 Misc. 563, 141 N. Y. Supp. 217. Where a client wishes to end a litigation the attorney may be restrained, on petition, from taking further proceedings in the case upon condition that the question as to the attorney's compensation be referred and amount fixed paid by the client. *Matter of Cable*, 114 App. Div. 375, 99 N. Y. Supp. 1096. The power of the attorney for plaintiff to demand alimony ceases after the entry of judgment. *Kalmanowitz v. Kalmanowitz*, 108 App. Div. 297, 95 N. Y. Supp. 627; *Conklin v. Conklin*, 113 App. Div. 743, 99 N. Y. Supp. 30. Rendition of judgment terminates the relation where the employment is merely to conduct one action. *Wintner v. Rosemont Realty Co.*, 101 App. Div. 30, 91 N. Y. Supp. 452. But the authority of an attorney in an

action to receive service of papers extends to proceedings after judgment. *Lederer v. Lederer*, 47 Misc. 471, 95 N. Y. Supp. 934.

262 n. 853. See *Ellis v. Delafield*, 153 App. Div. 26, 137 N. Y. Supp. 1029.

262 n. 856. *Twelfth Ward Bank v. Luckes*, 129 N. Y. Supp. 227.

262 n. 858. In *re Robbins*, 61 Misc. 114, 112 N. Y. Supp. 1032. As precluding recovery on contingent retainer, see *Sargent v. McLeod*, 209 N. Y. 360, 103 N. E. 164.

263 n. 866. See *Oldmixon v. Severance*, 119 App. Div. 821, 104 N. Y. Supp. 1042.

264 n. 868. *Ransom v. Ransom*, 147 App. Div. 835, 133 N. Y. Supp. 173. Whether a contract to pay half of the amount recovered to the attorney is so unreasonable as to be void is one of fact. *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520, 78 N. E. 179. Where agreement for contingent fees, although large, was deliberately entered into by the client, and was free from fraud, and not so excessive as to show a purpose of the attorney to obtain improper or undue advantage, the contract will be upheld. *Weeks v. Gattell*, 125 App. Div. 402, 109 N. Y. Supp. 977.

264 n. 869. *Matter of Brackett*, 114 App. Div. 257, 99 N. Y. Supp. 802 (holding, in addition, that the attorney has no lien on a sum agreed to be paid by the husband when the parties are reconciled and discontinue the action).

264 n. 870. Compare *Weeks v. Gattell*, 125 App. Div. 402, 109 N. Y. Supp. 977.

264 n. 871. The mere fact that an attorney, in order to prosecute a just claim of his client, induces him to assign the claim to a third person who offices with the attorney, does not show a violation of the statute. *Wightman v. Catlin*, 113 App. Div. 24, 98 N. Y. Supp. 1071. Evidence of motives of the attorney or the owner of the claim in making the assignment seems inadmissible. *Id.*

**264 § 311.** While the attorney cannot sue he acquires a good title which he may transfer. In an action by his donee or transferee it will be presumed that the action was brought solely in the interest of the donee or transferee, even though she be the wife of the attorney, though the court may refuse relief if it appears that the action is brought in the interest of the attorney. *Beers v. Washbond*, 86 App. Div. 582, 83 N. Y. Supp. 993. While an attorney cannot sue on such prohibited purchase, "he may pass title to the security either to a bona fide holder or to one who had full knowledge of the illegal purpose, and such a purchaser may have the aid of the court for the enforcement of such a security provided only that the purchase of the security and its enforcement are not in fact in the interest of the attorney." *Id.* A person admitted to the bar but who has never filed his certificate and has not practiced for several years is not within this Code provision. *Thompson v. Stiles*, 44 Misc. 334, 89 N. Y. Supp. 876.

**266 n. 887.** *Sciolaro v. Asch*, 137 App. Div. 667, 122 N. Y. Supp. 518. Contract to divide contingent fees with another procuring the contract violates this provision. *Matter of Welch*, 156 App. Div. 470, 141 N. Y. Supp. 381. Agreement of attorney to pay the expenses of prosecuting a claim is within this prohibition. *McCoy v. Gas Engine, etc., Co.*, 152 App. Div. 642, 137 N. Y. Supp. 591, 71 Misc. 537, 129 N. Y. Supp. 251. "All agreements by which an attorney at law promises to pay to any person a percentage of any portion of the compensation that he is to receive from a client are prohibited, except where an attorney at law, having a claim to prosecute, wishes to obtain professional assistance from another attorney in the prosecution or defense of the claim, and it is allowed that compensation received for such prosecution or defense may be divided between the attorneys; but in all other cases the statute



absolutely forbids any agreement by an attorney at law by which he is to divide the compensation that he is to receive from his client with any person as a consideration of his retainer to prosecute or defend the action." In re Shay, 133 App. Div. 547, 118 N. Y. Supp. 146. An agreement whereby the attorney agrees to "pay all court fees, fees of witnesses and necessary disbursements to judgment" is champertous. Matter of Speranza, 186 N. Y. 280, 78 N. E. 1070. This Code provision prohibits the paying or agreeing to pay any layman, out of the prospective profits of cases, for services in inducing desired clients to place their claims in the attorney's hands for enforcement. Matter of Clark, 184 N. Y. 222, 77 N. E. 1. An agreement for a contingent fee and that the attorney shall not call upon the client for moneys to pay disbursements, is not champertous if the client voluntarily goes to the attorneys and they do not seek the retainer or do anything to induce it. Ransom v. Cutting, 188 N. Y. 447, 81 N. E. 324 [affirming on this point 112 App. Div. 150, 98 N. Y. Supp. 282].

266 n. 888. A contract to divide a contingent fee, while not enforceable by the attorney, is enforceable against the attorney by the layman with whom the contract is made. Irwin v. Curie, 171 N. Y. 409, 64 N. E. 161. It follows that the proposition laid down in the text that "no cause of action can arise out of a transaction thus prohibited" must be qualified so as to apply to a cause of action in favor of the attorney.

266 n. 889. Schwabe v. Herzog, 161 App. Div. 712, 146 N. Y. Supp. 644. See *supra* 251, 252, n. 795, for Code amendments of 1907.

266 n. 894. But a general or special appearance in an action by an attorney at law is presumptive evidence of the authority of the attorney so to appear. Cutting v. Jessmer, 101 App. Div. 283, 91 N. Y. Supp. 658.

267 n. 898. See also Rosenthal v. Forman, 115 N. Y. Supp. 282.

**269** n. 914. But see *Jefferson Bank v. Gossett*, 45 Misc. 630, 90 N. Y. Supp. 1049.

**270**. Cannot release a fund from a lien in favor of his client. *Van Kannell Revolving Door Co. v. Astor*, 55 Misc. 378, 105 N. Y. Supp. 683.

**270** n. 919. Presumption as to authority to consent to vacation of judgment, see *Hookey v. Greenstein*, 119 App. Div. 209, 104 N. Y. Supp. 621.

**270** n. 920. An attorney for plaintiff has authority to stipulate that defendant shall have the same time in which to answer or demur to the complaint when served as plaintiff had in which to serve the complaint, as a condition to the granting of the stipulation extending plaintiff's time to serve the complaint. *Morris v. Press Pub. Co.*, 98 App. Div. 143, 90 N. Y. Supp. 673.

**270** n. 922. *Morris v. Press Pub. Co.*, 98 App. Div. 143, 90 N. Y. Supp. 673. But the stipulation should not be relieved from where the parties cannot be placed in statu quo (*Id.*), nor in the absence of prejudice or misrepresentation. *Lee v. Winans*, 99 App. Div. 297, 90 N. Y. Supp. 960.

**270** n. 925. *Happel v. New York*, 117 N. Y. Supp. 627. Attorney may compromise cause of action. *Clinton v. New York Central, etc., R. R. Co.*, 147 App. Div. 468, 131 N. Y. Supp. 881. Law clerk cannot. *Alterman v. Weil*, 142 N. Y. Supp. 465. Evidence sufficient to show authority, see *Dorman v. Arkin*, 120 N. Y. Supp. 757.

**271** n. 934. Cannot delegate his authority. *Lacher v. Gordon*, 127 App. Div. 140, 111 N. Y. Supp. 283. That attorney has power to authorize another attorney to appear for him, and that the client is bound by such appearance, is held in *Reich v. Cochran*, 105 App. Div. 542, 94 N. Y. Supp. 404.

**271** n. 941. See *Harding v. Evans*, 140 App. Div. 92, 124 N. Y. Supp. 897.

**272 n. 943.** See *Stratton v. Graham*, 140 N. Y. Supp. 869.

**273 n. 950.** A substitution should not be ordered without protecting the attorney's lien, where he has been guilty of no misconduct. *Anglo-Continental Chemical Works v. Dillon*, 111 App. Div. 418, 97 N. Y. Supp. 1081.

**273 n. 951.** The right of a receiver of an insolvent corporation to change attorneys is not absolute as in the case of other clients. *People v. Bank of Staten Island*, 112 App. Div. 791, 99 N. Y. Supp. 486.

**274.** Substituted attorney cannot compel old attorneys to deliver copy of stenographer's minutes of first trial paid for by them, unless the disbursement therefor is paid. *Sweet v. Ellis*, 160 App. Div. 870, 144 N. Y. Supp. 556.

**274 n. 955.** *Jeny v. Merkle*, 128 App. Div. 833, 112 N. Y. Supp. 1106.

**275 § 324.** Motion may be withdrawn. *Simers v. Great Eastern Clay Products Co.*, 82 Misc. 422, 143 N. Y. Supp. 1020.

**276.** Whether there has been such misconduct as to warrant unconditional substitution should not be tried on conflicting affidavits. *Matter of Lesster*, 134 N. Y. Supp. 401.

**276 n. 973.** *Contra*, *Slepin v. Beck*, 84 Misc. 254, and see post, **3710 n. 52**.

**278 n. 981.** *Kane v. Rose*, 87 App. Div. 101, 84 N. Y. Supp. 111. Such a reference is merely to take testimony and report, so that the referee cannot award costs. If the judge who orders it goes out of office pending the reference, a motion to confirm it may be made by the original attorney or his counsel before the court. *Frost v. Reinach*, 40 Misc. 412, 81 N. Y. Supp. 246. Reference need not be ordered where both parties submit question of compensation to the court, and judge had presided in case in which services were rendered. *Scheu v. Blum*, 124 App. Div. 678, 109 N. Y. Supp. 130. Bill of particulars of attorney's claim

will not be ordered before hearing on reference. *Dacey v. Fogel*, 144 App. Div. 160, 128 N. Y. Supp. 750.

**278 § 328.** Where the amount due was the subject of dispute, or the question of the existence of the attorney's lien was controverted, the court had ample power to determine these issues in a summary manner; but the court cannot ignore such issues and without the consent of the parties, or sufficient cause being shown, direct the substitution of another attorney upon condition that a bond be given to the former attorneys to secure their claims for services rendered. *Lederer v. Goldston*, 63 Misc. 323, 117 N. Y. Supp. 151.

**278 n. 984.** Where the attorney abandons the case without cause, after receiving an allowance from the court for counsel fees pendente lite in a divorce suit, the order of substitution should not award him additional compensation. *Cary v. Cary*, 97 App. Div. 471, 89 N. Y. Supp. 1061.

**279.** The order is not objectionable because it provides no punishment in case of failure of the client to make the payment to the removed attorney. *Kane v. Rose*, 87 App. Div. 101, 84 N. Y. Supp. 111. The order may be conditioned on payment of the amount due the attorney of record, and where a reference has been ordered to determine the value of the services with a direction that the attorney have a lien for the amount found due him, the client who accepts the order of substitution is bound by the directions as to the lien. *Id.*

**279 n. 985.** Amount due may be required to be paid or secured. *Matter of Dunn*, 205 N. Y. 398, 98 N. E. 909.

**279 n. 986.** The lien should not include services not performed where the attorney is dismissed before trial, although he had the case on a contingent fee. *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. Supp. 1059.

**280 n. 994.** Amount of claim must be determined and

either paid or secured before order can be made to turn over papers. *Matter of Hollins*, 197 N. Y. 361, 90 N. E. 997.

280 n. 995. *Matter of Rieser*, 137 App. Div. 177, 121 N. Y. Supp. 1070. Lien on papers is forfeited. *Matter of Dunn*, 205 N. Y. 398, 98 N. E. 909.

280 n. 996. See *Jeny v. Merkle*, 128 App. Div. 833, 112 N. Y. Supp. 1106.

281 n. 1001. An amendment of this Code provision in 1913 (c. 741) adds the following provision: "If after such notice, given as herein provided, no attorney appears for the party notified within the time specified in this section, the party serving the notice may proceed with the cause, and take a dismissal of the complaint, or a verdict, decision or judgment, as the case requires, and it is not necessary to give any further notice."

282 § 336. A summary proceeding does not lie to review, under the general power claimed to be possessed by the court to control its officers, a voluntary payment by a client from moneys in his possession to an attorney for services rendered, by compelling the attorney to refund. *In re Hess*, 133 App. Div. 634, 118 N. Y. Supp. 171. That the client can only proceed by action in the second judicial department, see *Arone v. Saunders*, 43 Misc. 138, 88 N. Y. Supp. 259.

282 n. 1016. Client may compel attorney to apply sum paid him to liquidation of costs and disbursements as per agreement. *Anderson v. New York & H. R. R. Co.*, 150 App. Div. 432, 135 N. Y. Supp. 30.

283 n. 1017. *Matter of Nellis*, 116 App. Div. 94, 101 N. Y. Supp. 698; *Matter of Hitchings*, 157 App. Div. 392, 142 N. Y. Supp. 339. Must be clear proof of relationship of attorney and client and of receipt of money and failure to account for it. *Matter of Minnesota Phonograph Co.*, 148 App. Div. 56, 132 N. Y. Supp. 1063.

283 § 337. Refusal of client to accept money as defense,

see *Matter of Sigmund Contracting Co.*, 153 App. Div. 374, 138 N. Y. Supp. 510.

**284.** It is no defense that the attorney has been disbarred. *In re Burnham*, 58 Misc. 576, 109 N. Y. Supp. 988.

**285 n. 1027.** *Matter of Niagara, Lockport, etc., Co.*, 203 N. Y. 493, 97 N. E. 33; *Matter of Hitchings*, 157 App. Div. 392, 142 N. Y. Supp. 339; *In re McIntosh*, 112 N. Y. Supp. 513; *Matter of Ney Co.*, 114 App. Div. 467, 99 N. Y. Supp. 982. See *Matter of Day*, 156 App. Div. 864, 142 N. Y. Supp. 62.

**285 n. 1028.** *People ex rel. White v. Feenaughty*, 51 Misc. 468, 101 N. Y. Supp. 700. See also *In re McIntosh*, 112 N. Y. Supp. 513.

**285 n. 1029.** *Matter of Ney Co.*, 114 App. Div. 467, 99 N. Y. Supp. 982.

**286 n. 1042.** The proceeding is not an action but a special proceeding and no formal judgment can be entered thereon. *Matter of Cartier*, 118 App. Div. 342, 103 N. Y. Supp. 505. It may be begun by affidavit or petition and order to show cause. *People ex rel. White v. Feenaughty*, 51 Misc. 468, 101 N. Y. Supp. 700.

**286 n. 1043.** An action for conversion of moneys on which the attorney has a lien does not lie in the first instance. *Rose v. Whiteman*, 52 Misc. 210, 101 N. Y. Supp. 1024. The reference is not to hear and "determine." *Matter of Cartier*, 118 App. Div. 342, 103 N. Y. Supp. 505. It should be "to take evidence and report the same to court with his opinion thereof." Furthermore the client should not be required to give an undertaking to pay the costs of the reference. *Matter of Ney Co.*, 114 App. Div. 467, 99 N. Y. Supp. 982. The reference is merely one to inform the conscience of the court and it may adopt or disregard the report of the referee. The referee is not bound to take irrelevant testimony. The report need not state separately the facts found and the conclusions of law. *Matter of Jones & Co.*, 117 App. Div. 775, 102 N. Y. Supp. 983.

**286 n. 1047.** The proper practice is stated in *People ex rel. White v. Feenaughty*, 51 Misc. 468, 101 N. Y. Supp. 700, to first merely make an order, on the hearing of the summary proceeding, directing the attorney to pay over, and then to serve the order and demand payment. The attorney is not guilty of a contempt until said order is made and served and payment demanded. .

**287.** Order denying motion to compel payment over of moneys should provide it is not a bar to an action therefor. In *re Shanley*, 124 App. Div. 935, 109 N. Y. Supp. 434.

**287 n. 1048.** Compare *In re Gardner*, 56 Misc. 272, 106 N. Y. Supp. 417.

**288-308.** Section 66 of the Code as to attorney's lien is now Cons. Laws, c. 30, §§ 474, 475.

**288 § 341.** A surrogate has no jurisdiction to enforce an attorney's common-law lien. In *re Robinson's Estate*, 59 Misc. 323, 112 N. Y. Supp. 280. The fact that the municipal court of New York city has no jurisdiction to enforce an attorney's lien does not prevent his right to a lien in an action brought in that court. The lien may be enforced in the Supreme Court. *Tynan v. Mart*, 53 Misc. 49, 103 N. Y. Supp. 1033.

**291 n. 1077.** *Matter of Smith*, 111 App. Div. 23, 97 N. Y. Supp. 171. Has lien on proceeds of verdict in favor of estate where client is an administrator. In *re Ross*, 123 App. Div. 74, 107 N. Y. Supp. 899.

**291 § 348.** If agreement for contingent fee is for a certain per cent. of all moneys "realized" by settlement or suit, and the judgment recovered is settled for less than its face, the attorney is not entitled to a lien for the stated per cent. of the face of the judgment. *Matter of Salant*, 158 App. Div. 697, 143 N. Y. Supp. 870. Where attorney substituted, former has lien only for value of services rendered up to date. *De Angelis v. Bank for Savings*, 74 Misc. 394, 132 N. Y. Supp. 295.

**292 n. 1079.** See *Morey v. Schuster*, 81 Misc. 515, 142 N. Y. Supp. 1054 [rev. in 159 App. Div. 602, 145 N. Y. Supp. 258]. Limited to amount stipulated in contract of retainer. *Matter of Winkler*, 154 App. Div. 532, 139 N. Y. Supp. 755.

**292 n. 1081.** See also *Matter of New York City*, 158 App. Div. 587, 143 N. Y. Supp. 943. "Such a lien is, however, confined to the services and disbursements in that action or proceeding." *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. Supp. 1035, 1040. Rule applied to special proceedings, see *In re Robbins*, 61 Misc. 114, 112 N. Y. Supp. 1032. But an attorney who conducts a number of cases under a single contract for a single fee not apportionable has a lien upon a judgment obtained in any one of the cases for the amount of the fee. *Matter of Heinsheimer*, 159 App. Div. 33, 143 N. Y. Supp. 895.

**292 n. 1083.** *Mathot v. Triebel*, 98 App. Div. 328, 90 N. Y. Supp. 903.

**292 § 349.** None but an attorney can assert a lien. *Matter of New York City*, 158 App. Div. 587, 143 N. Y. Supp. 943. Attorney employed to provide information on which a legal right may be asserted has no lien on the fund obtained by another attorney. *Holmes v. Bell*, 139 App. Div. 455, 124 N. Y. Supp. 301. Counsel not an attorney of record may have a general lien but not a statutory lien. *Harding v. Conlon*, 146 App. Div. 842, 131 N. Y. Supp. 903. Attorney must "appear" for party to be entitled to a lien, so that his death before actual institution of proceedings prevents a lien attaching to the report in his favor. *In re Robbins*, 61 Misc. 114, 112 N. Y. Supp. 1032.

**292 n. 1085.** Rights of retiring partner, see *Schiefer v. Freygang*, 141 App. Div. 236, 125 N. Y. Supp. 1037.

**293 § 350.** Statutory lien dates only from commencement of action or special proceeding in which the attorney is retained. *Matter of Albers Realty Co.*, 140 App. Div. 277, 125 N. Y. Supp. 179. Other lien attaches though no



action has been commenced. *Mathot v. Triebel*, 98 App. Div. 328, 90 N. Y. Supp. 903.

**293** § 351. Cannot assert a lien against the claim of one other than his client. *Matter of New York City*, 158 App. Div. 587, 143 N. Y. Supp. 943. Lien extends to award in condemnation proceedings. *Ferris v. Lawrence*, 138 App. Div. 541, 123 N. Y. Supp. 209. An attorney employed by plaintiff to appeal from a judgment establishing his rights to certain land, on the theory that plaintiff was entitled to more land, has no lien where the judgment is affirmed. *Matter of Jones*, 76 Misc. 331, 135 N. Y. Supp. 819. Where next of kin assert a claim against an administratrix which is defeated, there is no "cause of action, claim or counterclaim" to which a lien may attach in favor of the administratrix's attorney. *In re Robinson*, 125 App. Div. 424, 109 N. Y. Supp. 827.

**293** n. 1089. Lien extends to money paid into court. *Bernstein v. Traverso*, 82 Misc. 411, 143 N. Y. Supp. 1091. Does not authorize a lien on real property for services in certiorari proceedings to review a tax assessment thereon. *Matter of Ely*, 79 Misc. 118, 139 N. Y. Supp. 729. Right to lien not dependent on statute, see *Morey v. Schuster*, 81 Misc. 515, 142 N. Y. Supp. 1054.

**294** nn. 1090, 1092. *Agricultural Ins. Co. v. Smith*, 112 App. Div. 840, 98 N. Y. Supp. 347.

**295** n. 1098. See also *Baxter v. Connor*, 119 App. Div. 450, 104 N. Y. Supp. 327; *Serwer v. Serwer*, 91 App. Div. 538, 86 N. Y. Supp. 838.

**296** n. 1104. Real estate the subject of a certiorari proceeding is not the "proceeds thereof." *Matter of Ely*, 79 Misc. 118, 139 N. Y. Supp. 729.

**296** § 352. Attorneys have no lien upon real estate for procuring the passage of an act authorizing land office commissioners to grant and convey property without further payment. *Morey v. Schuster*, 159 App. Div. 602,

145 N. Y. Supp. 258. Real estate recovered for a client is not subject to lien. *Morey v. Schuster*, 159 App. Div. 602, 145 N. Y. Supp. 258. The attorney has a general lien on the papers of his clients which are in his possession. In *re McGuire's Estate*, 106 App. Div. 131, 94 N. Y. Supp. 125. So he has a lien on a life insurance policy placed in his hands to prepare and file proofs of loss and to collect. *Matter of Sweeney*, 86 App. Div. 547, 83 N. Y. Supp. 680. Where the client has become insane, the lien of his attorney upon bank books will be protected on directing their surrender to the committee of the incompetent. *Matter of Stenton*, 53 Misc. 515. No lien on copies of the printed record on an appeal to the Court of Appeals. In *re Bergstrom & Co.*, 116 N. Y. Supp. 245. Lien on papers, see In *re Rubel*, 132 App. Div. 910, 117 N. Y. Supp. 63.

296 n. 1108. Lien on award in condemnation proceedings in general, see *Matter of Scheier (Wadick Lien)*, 159 App. Div. 861, 144 N. Y. Supp. 882.

297 § 353. Where plaintiff is known to be irresponsible, defendant liable to extent of money paid in settlement. *Bloch v. Bloch*, 136 App. Div. 770, 121 N. Y. Supp. 475. If one sued for conversion of property held by him under an innkeeper's lien delivers up the property on the settlement of his account, he cannot, in a summary proceeding, be charged with the amount of the lien of plaintiff's attorney. *Matter of Winkler*, 154 App. Div. 532, 139 N. Y. Supp. 755. The statute applies to statutory arbitrations, as special proceedings. *Webb v. Parker*, 130 App. Div. 92, 114 N. Y. Supp. 489. If the client discontinues the action without receiving any sum in settlement, the attorney is not entitled to have his lien determined on the motion for discontinuance, on his affidavit setting out the facts. *Sullivan v. McCann*, 113 App. Div. 61, 98 N. Y. Supp. 947. Such affidavit, not served on his client, cannot be treated as a petition under section 66 of the Code. *Id.* Section 480 of the Judiciary

Law, a new section added to the Judiciary Law by Laws of 1913, chapter 603, reads as follows: "Sec. 480. *Settlement of actions for personal injury*.—If, in an action commenced to recover damages for a personal injury or for death as the result of a personal injury, [there is] an attorney having or claiming to have a lien for services performed or to be performed who shall have appeared for the person or persons having or claiming to have a right of action for such injury or death, no settlement or adjustment of such action shall be valid, unless consented to in writing by such attorney and by the person or persons for whom he shall have appeared, or approved by an order of the court in which such action is brought." This applies, however, only where the attorney has, or claims to have, a lien for services. *People ex rel. Sweeney v. Nassau Electric R. R. Co.*, 84 Misc. 558, 146 N. Y. Supp. 1054.

297 n. 1116. *Corbit v. Watson*, 88 App. Div. 467, 85 N. Y. Supp. 125. Proceeding to enforce lien does not lie where it is not shown that the client is either unwilling or unable to pay the attorney's fees. *Goldstein v. Nassau Electric Co.*, 157 App. Div. 226, 141 N. Y. Supp. 805.

297 n. 1117. Of course if the stipulation for discontinuance has been obtained from the plaintiff by fraud, the mere offer to pay the amount of his attorney's claim does not require that the settlement stand, but in such a case the question of fraud should be tried on amended pleadings. *Kuehn v. Syracuse Rapid Transit R. Co.*, 104 App. Div. 580, 93 N. Y. Supp. 883 [reversed on other grounds in 183 N. Y. 456].

298 n. 1123. *Flannery v. Geiger*, 46 Misc. 619, 92 N. Y. Supp. 785. See *Sargent v. McLeod*, 209 N. Y. 360, 103 N. E. 164 [rev. 155 App. Div. 21, 139 N. Y. Supp. 666].

299. Where a case is settled after the service of the summons but before the complaint is served, and the client refuses to verify the complaint, the motion to dismiss for

failure to serve the complaint should not be conditioned on the payment by the client to his attorney of his portion of the settlement. *Russo v. Darmstadt*, 116 App. Div. 887, 102 N. Y. Supp. 209.

299 n. 1126. *Crossman v. Smith*, 116 App. Div. 791, 102 N. Y. Supp. 18. See also *Horn v. Horn*, 115 App. Div. 292, 100 N. Y. Supp. 790. Where an answer does not contain a counterclaim, attorneys for defendant have no statutory lien. *Gildersleeve v. Reitz*, 80 Misc. 685, 142 N. Y. Supp. 674.

299 n. 1129. See also *infra* 2027, n. 31. Where, after the impaneling of a jury, defendant asked for a dismissal because of a settlement with the plaintiff shortly before trial, and plaintiff's attorney had no knowledge of the settlement and insisted upon a continuance of the action to establish their attorney's lien, declining an offer by defendant to pay their costs, disbursements and compensation upon the basis of the settlement, and a verdict was rendered for plaintiff which defendant moved to set aside, it was improper, on such motion, after having received affidavits on behalf of plaintiff challenging the honesty and fairness of the settlement, to refuse to receive counter-affidavits from defendant. *Kuehn v. Syracuse Rapid Transit R. Co.*, 183 N. Y. 456, 76 N. E. 589 [reversing 104 App. Div. 580, 93 N. Y. Supp. 883, which did not decide this point]. After a settlement, "defendant's" attorney will not be granted leave to continue the action to obtain costs against the plaintiff. *Pomeranz v. Marcus*, 40 Misc. 442, 82 N. Y. Supp. 707.

299 n. 1129a. In such an action the attorneys cannot recover more than the sum to which they were entitled under their contract with the client, i. e., the percentage based on the sum as settled. *New v. Brooklyn Heights R. Co.*, 113 App. Div. 446, 99 N. Y. Supp. 290. The client is a necessary party to an action to enforce the lien. *Oishei*

v. Pennsylvania R. Co., 117 App. Div. 110, 102 N. Y. Supp. 374. But the attorney is not obliged in the first instance to proceed against the client alone. The lien does not cover costs where the settlement was without costs. *Oishei v. Metropolitan St. R. Co.*, 110 App. Div. 709, 97 N. Y. Supp. 447.

300. Where the defendant who settled before judgment is a foreign corporation but is personally served within the state, the court has jurisdiction of an action to enforce the lien although the client is outside the state so that service on him must be by publication. *Oishei v. Pennsylvania R. Co.*, 117 App. Div. 110, 102 N. Y. Supp. 374. If the attorneys see fit to bring an action in equity, the court cannot object to the application of that remedy; but, where the direction of the court is asked as to continuing the action to judgment for the benefit of the attorneys or to proceed as provided for by section 66 of the Code, the court should rarely, if ever, permit the action to be continued, but should exercise the power clearly given by section 66 of the Code, and itself determine whether a lien exists, and the amount thereof, and should then, by appropriate remedy, enforce the lien so determined to exist. *Smith v. Acker Process Co.*, 102 App. Div. 170, 92 N. Y. Supp. 351. No order can be made under section 66 of the Code, where it is not shown what amount of compensation is claimed by the attorneys, nor that their client is not financially responsible so as to be able to pay the amount actually owing. *Smith v. Acker Process Co.*, 102 App. Div. 170, 92 N. Y. Supp. 351.

300 n. 1130. Where the demand of defendant's counsel for a discontinuance of the action was coupled with an offer to pay plaintiff's counsel any sum to which they were entitled for costs, disbursements, and compensation, the court should suspend the trial for the purpose of ascertaining the amount which plaintiff's counsel should have been paid; and if it appeared that the fairness and honesty of

the alleged settlement were challenged by plaintiff's counsel, should have taken such proofs as would have enabled it to determine whether the settlement should be enforced or set aside. *Kuehn v. Syracuse Rapid Transit R. Co.*, 183 N. Y. 456, 76 N. E. 589 [reversing 104 App. Div. 580, 93 N. Y. Supp. 883].

300 n. 1134a. See *In re Kaufman*, 113 N. Y. Supp. 525. In an action to enforce a lien, where the cause was settled before judgment, the defendant in the original action may defend on the ground that the attorney's agreement for compensation was unconscionable. *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520, 78 N. E. 179 [reversing 102 App. Div. 627, 92 N. Y. Supp. 1134 (mem.)], which affirmed 43 Misc. 414, 89 N. Y. Supp. 332].

301. Where plaintiff settles a judgment for a less sum than its face, he being financially irresponsible, his attorney on a contingent fee may have the satisfaction of the judgment set aside and execution issued against defendant to enforce his lien for "half" the judgment rather than half the amount paid. *Baxter v. Connor*, 119 App. Div. 450, 104 N. Y. Supp. 327. Cancellation of undertaking on appeal on a settlement without notice to the attorneys will be vacated, but not the cancellation of an undertaking to obtain a temporary injunction. *Knickerbocker Inv. Co. v. Voorhees*, 128 App. Div. 639, 112 N. Y. Supp. 842.

301 n. 1135. These cases, if they may be considered as holding that the lien cannot be enforced by a petition under section 66 of the Code, are overruled by the late decisions.

301 n. 1138. Of course this applies only where, after settlement, leave is granted to prosecute or defend the original action.

301 n. 1140. If judgment recovered is settled between the parties, the attorney is entitled to vacate the satisfaction of judgment. *Matter of Salant*, 158 App. Div. 697, 143

N. Y. Supp. 870. Cancellation of judgment for costs without notice to attorneys will be vacated. *Knickerbocker Inv. Co. v. Voorhees*, 128 App. Div. 639, 112 N. Y. Supp. 842. On a settlement after judgment, plaintiff's attorney cannot enforce his lien against the judgment debtor where the plaintiff is solvent and able to pay. *Gurley v. Gruenstein*, 44 Misc. 268, 89 N. Y. Supp. 887; *Corbit v. Watson*, 88 App. Div. 467, 85 N. Y. Supp. 125. See also *Witmark v. Perley*, 43 Misc. 14, 86 N. Y. Supp. 756.

**301 n. 1141.** Reference is necessary to determine amount of fee. *James v. Marquette*, 82 Misc. 400, 143 N. Y. Supp. 750.

**302 n. 1146.** See *Agricultural Ins. Co. v. Smith*, 112 App. Div. 840, 98 N. Y. Supp. 347.

**302 § 355.** See *Pettibone v. Thomson*, 72 Misc. 486, 130 N. Y. Supp. 284.

**303 n. 1150.** *Farmers' Loan & Trust Co. v. Westchester County Water Works Co.*, 143 App. Div. 78, 127 N. Y. Supp. 569.

**303 n. 1152.** *Kretsch v. Denofrio*, 137 App. Div. 617, 122 N. Y. Supp. 242; *Webb v. Parker*, 130 App. Div. 92, 114 N. Y. Supp. 489; *Smith v. Cayuga Lake Cement Co.*, 107 App. Div. 524, 95 N. Y. Supp. 236 (holding that it is immaterial that the judgments were rendered in the same action, especially where rendered in different courts and upon independent appeals from judgments rendered before different justices of the peace).

**304.** The attorney's lien on a judgment for costs is superior to any equitable right of set-off which the defendant has. *Barry v. Third Ave. R. Co.*, 87 App. Div. 453, 84 N. Y. Supp. 830.

**305 § 356.** See *Jackson v. Erkins*, 116 N. Y. Supp. 385. Assignment of judgment to attorney by his client merges the attorney's lien, and the judgment cannot be set off against a judgment against defendant. *Matter of McDonogh*, 138

App. Div. 291, 122 N. Y. Supp. 1033. Throwing up case without justification forfeits lien. Matter of Rieser, 137 App. Div. 177, 121 N. Y. Supp. 1070. Death of attorney does not cause loss of lien. Sargent v. McLeod, 209 N. Y. 360, 103 N. E. 164 [rev. on other grounds 155 App. Div. 21, 139 N. Y. Supp. 666]. Lien on printed papers on appeal not lost by client advancing money to pay cost of printing. Matter of Hollins, 197 N. Y. 361, 90 N. E. 997. Waiver of lien by withdrawal of motion in part, see James v. Marquette, 82 Misc. 400, 143 N. Y. Supp. 750. Lien of attorney on bank books of client in his possession after client judicially declared an incompetent, see *In re Stenton*, 53 Misc. 515, 105 N. Y. Supp. 295.

**305** § 357. See *Pettibone v. Thomson*, 72 Misc. 486, 130 N. Y. Supp. 284.

**306** § 358. An attorney, when sued by his client to recover money, cannot claim a lien where not pleaded. *Fitzpatrick v. Howard*, 148 App. Div. 802, 133 N. Y. Supp. 345. Special Term, rather than Appellate Division, should first determine whether lien is general as well as special. Matter of Farrington, 146 App. Div. 590, 131 N. Y. Supp. 312. Burden of showing amount of lien is on attorney. *Weber v. Werner*, 138 App. Div. 127, 122 N. Y. Supp. 943. Proceedings to enforce the statutory lien of an attorney are special proceedings; and an order confirming a referee's report fixing the amount of compensation is reviewable though no case was made or exceptions taken to the court's decision. *Sullivan v. McCann*, 124 App. Div. 126, 108 N. Y. Supp. 909. The lien is enforceable against a trustee in bankruptcy. *Kneeland v. Pennell*, 54 Misc. 43, 38 Civ. Proc. R. 489, 104 N. Y. Supp. 498. Where clause fixing value of attorney's services at a certain percentage of the moneys to be recovered is so closely connected with an invalid provision as to cause it to fall when the client repudiates the other clause, the attorney may enforce his lien for real value of services. *In re Snyder*,



190 N. Y. 66, 82 N. E. 742 [reversing 119 App. Div. 277, 104 N. Y. Supp. 571, which held that where case is settled against protests of plaintiff's attorney who took the case on an agreement for half the recovery, and the action discontinued and the amount paid into court, plaintiff is entitled to half the deposit, the remedy of the attorneys for settlement against their consent being by action for breach of the contract which expressly forbid such a settlement]. Where the issue is as to whether the agreement under which the attorney claims is champertous, and another agreement than that set up in the petition is alleged by the client, the proceeding should not be summarily determined upon petition and affidavits, but there should be a hearing on the facts either in open court or before a referee. *Matter of Speranza*, 186 N. Y. 280, 78 N. E. 1070. Where no money has been paid or agreed to be paid upon the discontinuance of an action against trustees, the attorney is not entitled, in proceedings to enforce his lien, to have the trustees brought in as parties or to a direction compelling them to pay the amount of his lien. *Sullivan v. McCann*, 115 App. Div. 146, 100 N. Y. Supp. 739. An action to enforce the lien on an annuity is properly brought in equity. *Ransom v. Cutting*, 112 App. Div. 150, 98 N. Y. Supp. 282. The order should not direct that the attorney have execution against the executors (the client) individually. *Matter of Smith*, 111 App. Div. 23, 97 N. Y. Supp. 171. The Supreme Court has power to enforce the lien, under section 66, though the only services to be rendered were in connection with establishing a claim in the Surrogate's Court against the estate of a deceased person. *Matter of Pieris*, 82 App. Div. 466, 81 N. Y. Supp. 927. A Surrogate's Court has jurisdiction to determine and enforce the lien for services to executors. *Matter of Smith*, 111 App. Div. 23, 97 N. Y. Supp. 171. Instead of enforcing the lien under section 66 of the Code, the attorney may sue on his contract of retainer as for money had and received by defendant for

his use. *Flannery v. Geiger*, 46 Misc. 619, 92 N. Y. Supp. 785.

**306 n. 1168.** This case must now be considered in connection with *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, which holds that an independent action lies to enforce the lien.

**306 n. 1170.** Not where attorney terminates relation without sufficient cause. *Matter of Barnum*, 154 App. Div. 897, 138 N. Y. Supp. 829. Applies only where dispute is between attorney and his client as distinguished from adverse party. *Matter of Salant*, 158 App. Div. 697, 143 N. Y. Supp. 870. That attorney has not preserved the money intact is no defense to a proceeding to determine the existence and amount of the lien. *Matter of Farrington*, 146 App. Div. 590, 131 N. Y. Supp. 312. If it is decided that the attorney has no lien, the court may direct him to pay over to his client the money which he retains. *Radley v. Gaylor*, 98 App. Div. 158, 90 N. Y. Supp. 758.

**306 n. 1171.** In an action to enforce the lien on a contract between the client and a third person and on the money due thereon, such third person is not a necessary party. *Mathot v. Triebel*, 98 App. Div. 328, 90 N. Y. Supp. 903.

**307 n. 1174.** Such a reference is one merely to take testimony and report the referee's opinion, so that the report is not binding on the court. The referee has no power to grant costs or an extra allowance. A motion to confirm the report is proper practice. *Frost v. Reinach*, 40 Misc. 412, 81 N. Y. Supp. 246. Whether attorney has a lien and the amount of it should be determined by the court rather than by a reference. *Matter of Rieser*, 137 App. Div. 177, 121 N. Y. Supp. 1070. Expenses of reference to determine amount of attorney's lien, as chargeable to attorney, see *Matter of Bachrach*, 152 App. Div. 836, 137 N. Y. Supp. 974.

**307 n. 1176.** But not where the lien is sought to be enforced against persons not his clients, in a summary proceed-

ing, where the amount due is in dispute. *Matter of Salant*, 158 App. Div. 697, 143 N. Y. Supp. 870. Execution should be issued for only amount of lien. *Bloch v. Bloch*, 136 App. Div. 770, 121 N. Y. Supp. 475.

**309 § 363.** Legislature may prescribe powers and duties of. *People ex rel. Wogan v. Rafferty*, 208 N. Y. 451, 102 N. E. 582.

**309 n. 1186.** This rule was amended in 1910 by also requiring book to be kept as to admission and disbarment of attorneys.

**311 n. 1197.** Code provision is now Cons. Laws, c. 30, § 753.

**311 n. 1198.** Code provision is now Cons. Laws, c. 30, § 250.

**313 n. 1207.** These Code provisions are now Cons. Laws, c. 11, § 195.

**314 n. 1218.** This Code section is amended by Laws 1903, c. 467, by adding a provision prohibiting a court stenographer from becoming interested in any way in relation to the printing of any work furnished by him.

**315 § 376.** Sections 254-262 of the Code are now a part of Cons. Laws, c. 30.

**315 § 377.** See Cons. Laws, c. 30, § 388, as am'd by Laws 1912, c. 120. The fact that there is no official interpreter attached to the court does not preclude the appointment of one proposed by a party though the opposing party refuses to consent to the appointment of said person. *Mendela v. Metropolitan St. R. Co.*, 43 Misc. 5, 86 N. Y. Supp. 930. Section 333 of the Code is amended by Laws 1909, c. 387, so as to require the appointment of three interpreters.

**315 n. 1224.** The part relating to the Surrogate Court is repealed by Laws 1909, n. 65.

**317 § 378.** "It is clear that under section 773 of the Judiciary Law the court is limited to the imposition of a fine

of \$250 for a contempt, unless the misconduct constituted such contempt as caused an actual loss or injury to the other party to the action. If such actual loss or injury has been produced, a fine sufficient to indemnify the party aggrieved must be imposed. The actual loss or injury contemplated by the statute is the damage which results from the misconduct of the person adjudged in contempt. The misconduct must be the proximate cause of the loss. It is not enough that the loss might possibly result, or even that it may probably result. The loss or injury contemplated must be such as necessarily results from the misconduct in order that the misconduct may be said to be its proximate cause." *Matter of Schwartz v. Sill*, 85 Misc. 55, 146 N. Y. Supp. 1068.

**317 n. 1229.** Nature of criminal contempts, see also *People ex rel. Stearns v. Marr*, 181 N. Y. 463, 466, 74 N. E. 431.

**319 § 381.** The power to punish for contempt is inherent and exists independent of statute. *People ex rel. Stearns v. Marr*, 88 App. Div. 422, 84 N. Y. Supp. 965. A justice who has no power to grant an injunction cannot punish the person to whom it is directed as for a criminal contempt. *Matter of Halle*, 160 App. Div. 369, 146 N. Y. Supp. 1094.

**320 § 382.** Court cannot refuse to impose any penalty, where contempt is shown. *Osterhoudt v. Prudential Ins. Co.*, 159 App. Div. 291, 144 N. Y. Supp. 193.

**320 n. 1238.** Order the disobedience of which is alleged to be contempt is to be first construed by the court making the order. *Matter of N. Y. and W. Town Site*, 145 App. Div. 630, 130 N. Y. Supp. 419.

**320 § 383.** Surety disposing of property after justifying on an undertaking is not a contempt. *Dollard v. Koronsky*, 138 App. Div. 213, 123 N. Y. Supp. 11 [aff. 67 Misc. 90, 121 N. Y. Supp. 987]. A proceeding to punish a party to a divorce suit for a criminal contempt for publishing letters

offered in evidence but excluded, does not lie where not purporting to be a statement of proceedings on the trial. *People ex rel. Brewer v. Platzek*, 133 App. Div. 25, 117 N. Y. Supp. 852.

**320** n. 1239. Code provision is now Cons. Laws, c. 30, § 750.

**320** n. 1240. In this respect criminal contempts are distinguishable from civil contempts. *People ex rel. Brewer v. Platzek*, 133 App. Div. 25, 117 N. Y. Supp. 852.

**321** § 383, subd. 1. Abstracting and secreting a written contract under investigation, pending the attorney's opening to the jury, is a criminal contempt. *Matter of Teitelbaum*, 84 App. Div. 351, 82 N. Y. Supp. 887. Desertion of the case, by an attorney, in the midst of the trial, after repeated efforts to compel the court to rescind a ruling, is punishable as a criminal contempt. *People ex rel. Chanler v. Newburger*, 98 App. Div. 92, 90 N. Y. Supp. 740.

**321** n. 1246. In *re McCormick*, 132 App. Div. 921, 117 N. Y. Supp. 70. Under sheriff who endeavors, although unsuccessfully, to persuade witness to disobey a subpoena duces tecum, is guilty. *People ex rel. Drake v. Andrews*, 197 N. Y. 53, 90 N. E. 347 [rev. 134 App. Div. 32].

**322.** Subpoena duces tecum is not a mandate. *People ex rel. Drake v. Andrews*, 134 App. Div. 32, 118 N. Y. Supp. 37. Advising or directing a witness to disobey a subpoena cannot be punished as a criminal contempt, especially where disobedience to the subpoena did not result. *People ex rel. Drake v. Andrews*, 134 App. Div. 32, 118 N. Y. Supp. 37.

**322** n. 1250. In *re Jones*, 126 App. Div. 112, 110 N. Y. Supp. 565.

**324.** Section 14 of the Code is now Cons. Laws, c. 30, § 753. Section 2284 is now Cons. Laws, c. 30, § 773. Evidence of fraud practiced on the court by an attorney must establish guilt with reasonable certainty. *Snow v. Shreffler*, 148 App. Div. 422, 132 N. Y. Supp. 895. Justifying as a

surety on a bond, when insolvent, is a contempt. *Matter of Woods*, 134 App. Div. 361, 119 N. Y. Supp. 69.

**325.** Advising client to file a petition in bankruptcy pending supplementary proceedings is not a contempt. *Matter of Kepecs*, 123 N. Y. Supp. 872. Act of attorney in making false statements to the court is not a civil contempt. *Franzone v. Tumminelli*, 67 Misc. 549, 123 N. Y. Supp. 455.

**325** subd. 2. The party need not first exhaust all other remedies for making good the damages. *Matter of Goslin*, 95 App. Div. 407, 88 N. Y. Supp. 670.

**325** n. 1273. In *re Westminster Realty Corporation*, 123 App. Div. 797, 108 N. Y. Supp. 551. The fact of insolvency must be shown beyond a reasonable doubt. *Johnson v. Austin*, 76 App. Div. 312, 78 N. Y. Supp. 501.

**326.** Presenting false affidavits whereby an order of reference is obtained constitutes such "deceit" as warrants punishment by ordering party to pay costs of reference. *Dollard v. Koronsky*, 61 Misc. 392, 113 N. Y. Supp. 793. "Fictitious bail" is not limited to a false signature or to an insolvent surety but also includes bail which the obligee may not realize on, as where a party gives an undertaking with knowledge that the sole surety is a minor. *Hall v. Lanza*, 97 App. Div. 490, 89 N. Y. Supp. 980.

**326** n. 1276. May include president of corporation. In *re Westminster Realty Corporation*, 123 App. Div. 797, 108 N. Y. Supp. 551.

**327** n. 1287. See *Youker v. Youker*, 122 App. Div. 901, 106 N. Y. Supp. 810.

**327** nn. 1288, 1289. Code provisions are now Cons. Laws, c. 6, §§ 20, 21.

**328.** Section 2268 of the Code is now Cons. Laws, c. 30, § 756.

**329.** Refusal of attorney to permit papers to be put in evidence, as directed by a referee in supplementary proceedings, is a contempt. *Steinman v. Conlon*, 79 Misc. 527,

141 N. Y. Supp. 79, 155 App. Div. 888, 140 N. Y. Supp. 1147. A surety on an undertaking for the payment of a judgment in case it is not set aside in proceedings therefor, who, pending the proceedings, disposed of all his property with the intent of making his obligation nugatory, may be summarily proceeded against for contempt. *Dollard v. Koronsky*, 64 Misc. 611, 118 N. Y. Supp. 922. An attorney or his client who removes attached property from the jurisdiction of the court is guilty of contempt notwithstanding the attachment was not served on him. *Lowenthal v. Hodge*, 120 App. Div. 793, 105 N. Y. Supp. 527; *Lowenthal v. Hodge*, 120 App. Div. 304, 105 N. Y. Supp. 120.

329 subd. 4. Offering money and persistently urging a wife to settle an action against her husband and to disregard her attorney's advice is not a contempt. *Herrmann v. Herrmann*, 82 App. Div. 437, 81 N. Y. Supp. 811.

333 § 386. A purchaser at a judicial sale may be compelled to perform by contempt proceedings though the order may also be enforced by execution. *Rowley v. Feldman*, 84 App. Div. 400, 82 N. Y. Supp. 679. That the persons violating an injunction were not parties to the action in which the injunction was issued does not prevent their punishment as for a criminal contempt. *People ex rel. Stearns v. Marr*, 181 N. Y. 463, 468, 74 N. E. 431.

333 n. 1329. Failure to pay alimony is governed by section 1773 of the Code. *Stanley v. Stanley*, 116 App. Div. 544, 101 N. Y. Supp. 725.

334 n. 1333. *Curtis v. Powers*, 146 App. Div. 246, 130 N. Y. Supp. 914; *Saal v. South Brooklyn R. Co.*, 122 App. Div. 364, 106 N. Y. Supp. 996.

334 n. 1335. That the injunction order was not personally served on persons violating it does not preclude punishment for criminal contempt where they had knowledge of the injunction and of its terms. *People ex rel. Stearns v. Marr*,

181 N. Y. 463, 470, 74 N. E. 431. This is so even as against one not a party to the action. *Id.*

335 n. 1337. See also *Wilkins v. American Bank of Torreón*, 133 App. Div. 646, 118 N. Y. Supp. 210. Where original order is personally served, subsequent orders need not be. *Grant v. Greene*, 121 App. Div. 756, 106 N. Y. Supp. 532.

335 n. 1338. *Curtis v. Powers*, 146 App. Div. 246, 130 N. Y. Supp. 914.

335 n. 1340. But see *Matter of Depue*, 108 App. Div. 58, 95 N. Y. Supp. 1017.

335 n. 1341. *Grant v. Greene*, 55 Misc. 383, 105 N. Y. Supp. 641.

336 n. 1344. *People ex rel. White v. Feenaughty*, 51 Misc. 468, 101 N. Y. Supp. 700; *Frank v. Firestone*, 3 Current Ct. Dec. 34.

336 n. 1347. *State Bank v. Wilchinsky*, 65 Misc. 162, 119 N. Y. Supp. 131

336 n. 1349. *Hathorn v. Natural Carbonic Gas Co.*, 137 App. Div. 557, 121 N. Y. Supp. 683; *Lawson v. Tyler*, 98 App. Div. 10, 90 N. Y. Supp. 188. Rule applied to disobedience to subpoena duces tecum. *Littlefield v. Gansevoort Bank*, 62 Misc. 339, 114 N. Y. Supp. 769. Validity of order which is not appealable may be tested on application to punish for contempt for failure to obey the order. *Rudiger v. Coleman*, 206 N. Y. 412, 99 N. E. 1049; *Matter of Besch*, 202 N. Y. 552, 95 N. E. 1123.

338. If execution can issue, contempt proceedings do not lie where case does not come within subd. 4. *Coffin v. Coffin*, 161 App. Div. 215, 146 N. Y. Supp. 565.

338 n. 1355. See also *Zeigfeld v. Norwerth*, 148 App. Div. 185, 133 N. Y. Supp. 208.

338 n. 1357. See also *Hathorn v. Natural Carbonic Gas Co.*, 137 App. Div. 557, 121 N. Y. Supp. 683 (holding that it is no defense that order was modified on appeal).



**338 n. 1358.** See *Potter v. Rossiter*, 109 App. Div. 32, 95 N. Y. Supp. 1037 (where disobedience of interlocutory judgment was not punished).

**340 n. 1369.** No defense in case of trustee ordered to pay over money. *Matter of Boyer*, 74 Misc. 329, 134 N. Y. Supp. 231. Procedure, see *Schmohl v. Phillips*, 138 App. Div. 279, 122 N. Y. Supp. 974. That chemical formulas ordered to be turned over to a receiver have been destroyed by fire is no excuse for disobeying the order, where it is shown that the defendant had carried on business for a long time, and made use of the formulas in compounding medicines and that he made up and compounded such medicine without the aid, in many instances, of the written formula, and where he makes no claim of inability to reproduce. *Lawson v. Tyler*, 98 App. Div. 10, 90 N. Y. Supp. 188.

**340 n. 1374.** Code provisions is now Cons. Laws, c. 30, § 773.

**341 § 389.** Persons not parties to the action in which the order disobeyed was granted may be punished, and this is so even though the order was not personally served on them, where they had knowledge of it. This rule covers strikers who are members of a union which has been enjoined. *People ex rel. Stearns v. Marr*, 181 N. Y. 463, 74 N. E. 431. A municipal corporation may be punished for contempt. *Marson v. Rochester*, 112 App. Div. 51, 97 N. Y. Supp. 881.

**341 n. 1377.** But persons not parties to an injunction suit, and not acting as agents or in collusion with defendants, cannot be punished for violating the decree. *Strawberry Island Co. v. Cowles*, 79 Misc. 279, 140 N. Y. Supp. 353.

**341 n. 1378.** Corporation may be fined for contempt. *Schreiber v. Garden*, 152 App. Div. 817, 137 N. Y. Supp. 747.

## CHAPTER IV

## PLACE OF TRIAL

**348 n. 12.** Action for partnership accounting as to real estate. *Chappell v. Chappell*, 125 App. Div. 127, 109 N. Y. Supp. 648. Refers only to causes of action arising in the state. *Brisbane v. Pennsylvania R. R. Co.*, 141 App. Div. 366, 125 N. Y. Supp. 1042. A new section, numbered 982a, was added to the Code article relating to the place of trial of action by amendment in 1913 (c. 76), as follows: "An action may be maintained in the courts of this state to recover damages for injuries to real estate situate without the state, or for breach of contracts or of covenants relating thereto, whenever such an action could be maintained in relation to personal property without the state. The action must be tried in the county in which the parties or some one thereof resides, or if no party resides within the state, in any county." This provision changes the law as it previously existed that actions for injuries to real property were local and that the state courts have no jurisdiction of such an action when the property is located in another state.

**349.** Where an action is brought in a municipal or justice court, and removed to the Supreme Court on a plea of title to real estate being involved, the defendant has no absolute right to the prosecution of the action in the county where the real estate is situated. *Eaton v. Hall*, 78 App. Div. 542, 79 N. Y. Supp. 887.

**351 n. 27.** An action for an accounting and sale of property brought in the names of plaintiff and defendant as trustees for their benefit and that of their associates, was held not within this Code subdivision. *Barnes v. Barnhart*, 102 App. Div. 424, 92 N. Y. Supp. 459.

**352.** Suit to rescind contract for sale of land and to recover the amount paid, on ground of fraud, is within this provision.

*Birmingham v. Squires*, 139 App. Div. 129, 123 N. Y. Supp. 906. That the action will also affect the title to personal property does not require the action to be tried in a county where one of the parties resides. *Hall v. Gilman*, 77 App. Div. 464, 79 N. Y. Supp. 307.

**353.** An action to compel a cemetery corporation to allow plaintiffs to remove a dead body from the cemetery to reinter it in another cemetery does not affect any right or interest in real property. *Cohen v. Congregation Shearith Israel*, 85 App. Div. 65, 82 N. Y. Supp. 918.

**354 § 394.** An action against a newspaper for libel should be brought in the county where the paper is published and circulates. *MacCormac v. Tobey*, 109 App. Div. 581, 96 N. Y. Supp. 302.

**355.** *State Board of Pharmacy v. Rhinehardt*, 116 App. Div. 495, 101 N. Y. Supp. 769. An action to recover back money lost on a wager, where based on 1 Rev. St. 662, §§ 8, 9, as distinguished from Laws 1895, c. 570, § 17, is not an action for a penalty. *Mendoza v. Rose*, 44 Misc. 241, 88 N. Y. Supp. 938.

**355 n. 51.** *Bell v. Polymero*, 99 App. Div. 303, 90 N. Y. Supp. 920.

**356 § 394(2).** An action against the sheriff of a county for neglect to seize certain chattels therein, under a writ granted in another county, must be brought in the former county. *Packard v. Hesterberg*, 48 Misc. 30, 96 N. Y. Supp. 72.

**357.** Act of assessor in assessing property held done "in virtue of his office." • *Conley v. Carney*, 126 App. Div. 337, 110 N. Y. Supp. 528.

**357 n. 64.** So held under present Code. *Philips v. Leary*, 114 App. Div. 871, 100 N. Y. Supp. 200.

**360.** Venue of action for dissolution of partnership is determined by residence of parties. *Williams v. Williams*, 83 Misc. 560, 145 N. Y. Supp. 564.

**360 § 395.** If parties consent, venue of transitory actions may be laid in any county. *Anderson v. Nassau Electric R. R. Co.*, 138 App. Div. 816, 123 N. Y. Supp. 374. Place of trial of action under Domestic Commerce Law (Laws 1902, c. 482), see *Walsh v. Maroney*, 53 Misc. 369, 104 N. Y. Supp. 758.

**360 n. 88.** The residence "at the time of the commencement of the action" governs. *Burke v. Frenkel*, 97 App. Div. 19, 89 N. Y. Supp. 621.

**361 n. 96.** *Jacina v. Lemmi*, 155 App. Div. 397, 139 N. Y. Supp. 1034. So is action for death by wrongful act. *Zeikus v. Florida East Coast R. Co.*, 153 App. Div. 345, 138 N. Y. Supp. 478; *Pensabene v. F. & J. Auditore Co.*, 78 Misc. 538, 138 N. Y. Supp. 947.

**361 n. 100.** *Mills & Gibb v. Starin*, 119 App. Div. 336, 104 N. Y. Supp. 230. See *Dresser v. Mercantile Trust Co.*, 53 Misc. 18. Contra, *Hislop v. Taaffe*, 141 App. Div. 40, 125 N. Y. Supp. 614.

**362 n. 101.** The action is properly brought in the county in which plaintiff resides though he may also have a residence elsewhere. *Bischoff v. Bischoff*, 88 App. Div. 126, 85 N. Y. Supp. 81. In the first department, however, it is held that the fact that a person has apartments which he occupies while in the city of New York and has an office in such city for the transaction of business, does not make him a resident of New York city, but that the residence contemplated by the statute is a permanent residence. *Washington v. Thomas*, 103 App. Div. 423, 92 N. Y. Supp. 994. And see *Dresser v. Mercantile Trust Co.*, 53 Misc. 18, 102 N. Y. Supp. 569.

**362 n. 102.** Question of residence is largely one of intention. *Bischoff v. Bischoff*, 88 App. Div. 126, 85 N. Y. Supp. 81.

**362 n. 104.** In opposition to the rule laid down in the text is *Rathbun v. Brownell*, 43 Misc. 307, 88 N. Y. Supp. 833,

which lays down the common sense rule that the residence of a party to the record who is not a necessary or proper party is to be disregarded though the fact that no relief is sought against a defendant does not make him an improper or unnecessary party.

**363 n. 107.** Is where it has its principal office and place of business. *Finch School v. Finch*, 144 App. Div. 687, 129 N. Y. Supp. 1.

**363 n. 108.** *Poland v. United Traction Co.* is officially reported in 88 App. Div. 281. The action may be brought in a county through which the road runs and in which it has a place for the regular transaction of business. *Mole v. New York, O. & W. R. Co.*, 53 Misc. 22, 102 N. Y. Supp. 308.

**363 n. 109.** If defendant is a resident, must be brought in county of his residence. *D'Oliver Mfg. Co. v. Ross*, 3 Current Ct. Dec. 35. But it has been held that a foreign railroad corporation has a residence in any county through which it operates its road and hence may be sued in such a county although plaintiff resides in another county. *Polley v. Lehigh Valley R. R. Co.*, 138 App. Div. 636, 122 N. Y. Supp. 708.

**364 § 397.** An amendment in 1913 adds to this provision "or an issue of fact triable by the court without a jury, arising in a county where no special terms distinct from trial terms are appointed to be held for the trial of such cases, may be tried at a special term" in any county, etc.

**364 n. 119.** The citation in the note should be Code Civ. Proc., § 990.

## CHAPTER V

## PARTIES TO ACTIONS

**375 § 403.** Only party to sealed instrument can sue on it. *Cleary v. Heyward*, 123 N. Y. Supp. 334. *Cestui que trust* cannot sue in relation to the trust property until the trustee has refused to sue. *Woolf v. Barnes*, 46 Misc. 169, 93 N. Y. Supp. 219.

**376.** At common law an action on a bond under seal must be brought in the name of the obligee, irrespective of the owner, and this is still the rule in this state except where the same has been modified by statute. *Alexander v. Union Surety & Guaranty Co.*, 89 App. Div. 3, 85 N. Y. Supp. 282.

**376 n. 13.** *Osborne v. Hughes*, 128 App. Div. 128, 112 N. Y. Supp. 572.

**376 n. 14.** Whether payment of a judgment recovered by the plaintiff will fully protect the defendant from the claims of third persons is the test whether the plaintiff is the real party in interest. *St. James Co. v. Security Trust & Life Ins. Co.*, 82 App. Div. 242, 81 N. Y. Supp. 739; *Meinhardt v. Excelsior Brewing Co.*, 98 App. Div. 308, 90 N. Y. Supp. 642.

**376 § 404.** Common-law rule and change thereof considered. *Gleason v. Northwestern Mutual Life Ins. Co.*, 203 N. Y. 507, 97 N. E. 35.

**377 nn. 18, 19.** This Code provision is now Cons. Laws, c. 41, § 41.

**378 n. 22.** A cause of action for deceit is assignable. *Keeler v. Dunham*, 114 App. Div. 94, 99 N. Y. Supp. 669.

**379.** The assignee of part of an entire claim cannot maintain an action "at law" where the debtor objects unless all the parties interested in the claim are joined as parties. *Dickinson v. Tysen*, 125 App. Div. 735, 110 N. Y. Supp. 269. But it is held it is no longer open to ques-

tion in this state that the assignee of part of a claim may maintain an action to recover the portion which has been assigned to him. *Chase v. Deering*, 104 App. Div. 192, 93 N. Y. Supp. 434. An assignee of a part of an entire claim for money alleged to be due on a contract, in a suit against the debtor to recover the part assigned to him, cannot make the assignee of another part of the claim and the assignor who retains the balance of the claim, co-defendants with the debtor, where the plaintiff does not state or attempt to state any cause of action against either of such co-defendants, and where the debtor does not demand the presence of such parties but seeks to have the allegations relating thereto stricken out of the complaint as irrelevant because such facts may have the effect of changing the mode of trial. *Id.* One who has made a general assignment and parted with all interest in the cause of action, pending the action, and thereafter amends so as to state a new cause of action, is not the real party in interest and cannot maintain the action. *Foster v. Central Nat. Bank*, 183 N. Y. 379, 76 N. E. 338 [affirming on this point, 106 App. Div. 616, 94 N. Y. Supp. 1146, 93 N. Y. Supp. 603].

379 n. 24. This Code provision is now Cons. Laws, c. 20, § 375.

379 n. 25. *Hunter v. Allen*, 106 App. Div. 557, 94 N. Y. Supp. 880; *Huck v. Kraus*, 50 Misc. 528, 99 N. Y. Supp. 490. The fact that the transaction as between the parties appears to have been merely colorable constitutes no defense on the ground that the assignee was not the real party in interest. Where an assignment is valid upon its face, a debtor will not be permitted to raise a question as to the consideration or the equities between the assignor and the assignee. *Friedman v. Schulman*, 46 Misc. 572, 92 N. Y. Supp. 801. That the action, in such case, may be brought by the assignor, see *Hawkins v. Mapes-Reeve Const. Co.*, 178 N. Y. 236, 242, 70 N. E. 783.

. 379 n. 26. *Huck v. Kraus*, 50 Misc. 528, 99 N. Y. Supp. 490.

380 n. 28. But where the assignment is absolute the assignor cannot sue although the claim was reassigned after action brought. *Walsh v. Woarms*, 109 App. Div. 166, 95 N. Y. Supp. 824.

380 n. 30. See *Klauck v. Federal Ins. Co.*, 60 Misc. 170, 182, 111 N. Y. Supp. 1037. It seems that it is immaterial that the contract is under seal. *Dilcher v. Nellany*, 52 Misc. 364, 102 N. Y. Supp. 264. Rule applied to principal suing on note given to his agent. *International Harvester Co. v. Champlin*, 155 App. Div. 847, 140 N. Y. Supp. 842.

384 n. 52. This Code provision is now Cons. Laws, c. 41, § 41.

386 n. 65. *Elliott v. Brady*, 118 App. Div. 208, 103 N. Y. Supp. 156.

386 n. 68. *Kelly Asphalt Block Co. v. Barber Asphalt Co.*, 211 N. Y. 68.

387 § 413. Assignor of property as collateral security may sue as trustee of express trust. *Whiting v. Glass*, 81 Misc. 402, 142 N. Y. Supp. 512. Right of receiver to sue, see *Rinehart v. Hasco Bldg. Co.*, 153 App. Div. 153, 138 N. Y. Supp. 258.

388. While ordinarily all the partners constituting a firm must join as plaintiffs in an action relating to firm business, yet where one of the partners is a trustee of an express trust in respect to the fund sought to be recovered, he may sue alone. *Meinhardt v. Excelsior Brewing Co.*, 98 App. Div. 308, 90 N. Y. Supp. 642.

388 n. 75. See also *Weber v. Columbia Amusement Co.*, 160 App. Div. 835, 146 N. Y. Supp. 53; *Davidge v. Guardian Trust Co.*, 136 App. Div. 78, 120 N. Y. Supp. 628; *Portoghese v. Illinois Surety Co.*, 81 Misc. 211, 142 N. Y. Supp. 500.



**388 n. 76.** See *Heppenstall v. Bandouine*, 60 Misc. 620, 113 N. Y. Supp. 849.

**389.** Agent may sue. *Armour v. Sound Shore Front Imp. Co.*, 71 Misc. 253, 128 N. Y. Supp. 331. Agent may sue as trustee of express trust. *Middleton v. Wohlgemuth*, 141 App. Div. 648, 126 N. Y. Supp. 734.

**391 n. 93.** Followed in *Hunt v. Provident Sav. Life Assur. Soc.*, 77 App. Div. 338, 342, 79 N. Y. Supp. 74.

**391 § 414.** Executor may sue on contract made with him, either individually or in his representative capacity. *Leavitt v. Scholes Co.*, 210 N. Y. 107, 103 N. E. 965 [rev. 148 App. Div. 78]. But see *Ehrman v. Bassett*, 159 App. Div. 753, 144 N. Y. Supp. 976.

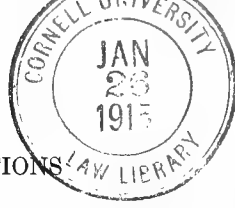
**392 § 417.** No action can be maintained at law between two firms having one member common to both. *Taylor v. Thompson*, 176 N. Y. 168, 176, 177, 68 N. E. 240.

**393.** Third person cannot sue or be sued on covenants in a sealed instrument. *Ronginsky v. Freudenthal*, 134 App. Div. 422, 119 N. Y. Supp. 409. Undisclosed agent cannot be sued upon a contract under seal. *Furculi v. Bittner*, 60 Misc. 112, 125 N. Y. Supp. 36.

**401 § 425.** Trustee held not a necessary party to action on trust agreement. *Spence v. Woods*, 134 App. Div. 182, 118 N. Y. Supp. 807.

**402 § 426.** In action on policy of indemnity. *White v. Maryland Casualty Co.*, 139 App. Div. 179, 123 N. Y. Supp. 840. While the trustee of an express trust may sue, there is no prohibition against the real party in interest being joined as a coplaintiff. *Cassidy v. Sauer*, 114 App. Div. 673, 99 N. Y. Supp. 1026. The assignor of a claim who has parted with his entire interest cannot be joined with the assignee as a party plaintiff. *Alexander v. Gloversville*, 110 App. Div. 791, 97 N. Y. Supp. 198.

**402 n. 148.** *Wood v. Fagan*, 126 App. Div. 581, 110 N. Y. Supp. 938; *Mullin v. Mullin*, 119 App. Div. 521, 104



N. Y. Supp. 323. The parties joined must not only have an interest in the subject of the action but also a right to enforce an obligation or recover property. *Conley v. Walton*, 49 Misc. 1, 96 N. Y. Supp. 400.

403 n. 150. *Mullin v. Mullin*, 119 App. Div. 521, 104 N. Y. Supp. 323.

403 n. 151. See *Prospect Park & Coney Island R. Co. v. Morey*, 155 App. Div. 347, 140 N. Y. Supp. 380; *Cobb v. Monjo*, 90 App. Div. 85, 85 N. Y. Supp. 597.

404 n. 156. See also *Climax Specialty Co. v. Seneca Button Co.*, 54 Misc. 152, 38 Civ. Proc. R. 476, 103 N. Y. Supp. 822.

405. One whose property has been destroyed by fire may join with insurance companies who have paid their share of the loss and taken an assignment pro tanto, in an action against a railroad company, to recover the damages for negligently setting fire to the property. *Jacobs v. N. Y. Cent. & H. R. R. Co.*, 107 App. Div. 134, 94 N. Y. Supp. 954. Persons injured as to their separate property by indivisible nuisance may join. *Green v. Smith*, 155 App. Div. 420, 140 N. Y. Supp. 43.

406 n. 167. *Natter v. Isaac H. Blanchard Co.*, 153 App. Div. 814, 138 N. Y. Supp. 969. Legatee and executors. *Porter v. Baldwin*, 139 App. Div. 278, 123 N. Y. Supp. 1043. The Code rule as to when one of a class may sue for all does not apply to statutory action to determine validity of probate of will. *Brinkerhoff v. Tiernan*, 61 Misc. 586, 114 N. Y. Supp. 698. Where the language of the agreement is joint, all the parties to whom the obligation runs must join as plaintiffs unless the complaint shows that the nature of the interest is really several. *Fisher Textile Co. v. Perkins*, 100 App. Div. 19, 90 N. Y. Supp. 993. And see *Weinfeld v. F. Bergner & Co.*, 114 N. Y. Supp. 284.

407. In an action by a mortgagor on a fire insurance policy, the mortgagee, to whom the loss is payable to the

extent of his interest, is so united in interest that where he refuses to join as plaintiff, he should be made a defendant. *Lewis v. Guardian F. & L. Assur. Co.*, 181 N. Y. 392, 396, 74 N. E. 224.

**409 § 428.** Two persons cannot be joined as defendants on the theory that plaintiff has a cause of action against one or the other. *Cohn-Baet-Myers & Aronson Co. v. Realty Transfer Co.*, 117 App. Div. 215, 102 N. Y. Supp. 122.

**409 n. 190.** An indorser of a note may be sued alone without joining the maker. *Singer v. Abrams*, 47 Misc. 360, 94 N. Y. Supp. 7. Original contractor and its successor may be joined. *Automatic Strapping Mach. Co. v. Twisted Wire & Steel Co.*, 142 N. Y. Supp. 6.

**410 n. 191.** Refusal to consent is necessary. *Baron v. Lakow*, 121 App. Div. 544, 106 N. Y. Supp. 243.

**410 n. 197.** Obligor on bond and obligee who has assigned it under guaranty of payment may be joined as defendants in an action on the bond, as parties liable on the same instrument (Code, § 454) the obligee being liable as a surety. *Stein v. Whitman*, 156 App. Div. 861, 142 N. Y. Supp. 4 [rev. in 209 N. Y. 576, 103 N. E. 1133].

**412 n. 212.** See also *Page v. Dempsey*, 184 N. Y. 245, 77 N. E. 9.

**413 § 429.** Trustee necessary party to suit to set aside separation agreement on ground of fraud. *Ducas v. Ducas*, 150 App. Div. 397, 135 N. Y. Supp. 35. Persons jointly liable are all necessary defendants. *Trust & Guarantee Co. v. Sawyer*, 146 App. Div. 63, 130 N. Y. Supp. 582. Stating cause of action to which absent parties are not indispensable does not make the complaint demurrable although part of relief prayed for cannot be granted without the presence of such parties. *Pollitz v. Wabash R. R. Co.*, 142 App. Div. 755, 127 N. Y. Supp. 782.

**413 n. 218.** This applies to members of a firm. *Hyde & Sons v. Lesser*, 93 App. Div. 320, 87 N. Y. Supp. 878.

In an equity suit, all persons materially interested, either legally or beneficially, must be joined. *International Paper Co. v. Hudson River Water Power Co.*, 92 App. Div. 56, 66, 86 N. Y. Supp. 736. Foreign executor as necessary defendant. *De Coppet v. Cone*, 199 N. Y. 56, 92 N. E. 411 [aff. 132 App. Div. 928]. Legatees held not necessary parties. *Recht v. Herschman-Bleier-Edelstein Co.*, 139 App. Div. 300, 123 N. Y. Supp. 932.

417 n. 245. Four are "many persons." *Climax Specialty Co. v. Seneca Button Co.*, 54 Misc. 152, 38 Civ. Proc. R. 476, 103 N. Y. Supp. 822.

419 n. 250. See post, 2073 n. 80.

419 n. 255. But see *Gittleman v. Feltman*, 191 N. Y. 205, 83 N. E. 969. Compare *Johnston v. Aleshire*, 130 App. Div. 178, 114 N. Y. Supp. 398.

419 § 433. A defendant cannot, by motion, compel the plaintiff to bring in new defendants. His remedy is to raise the objection of a defect of parties by demurrer or answer. *Knickerbocker Trust Co. v. Oneonta, C. & R. S. R. Co.*, 111 App. Div. 812, 97 N. Y. Supp. 673.

420. Where new issues are raised by defendant, it seems that an order bringing in new defendants will not be granted. *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410. A person brought in as a coplaintiff by consent of all the parties is entitled to the same rights and privileges as the original plaintiff. He may move to bring in a new defendant but where the original plaintiff objects the granting of the motion should be conditioned on the giving of a bond to indemnify the latter against costs if such defendant is successful. *Weed v. First National Bank*, 117 App. Div. 340, 101 N. Y. Supp. 1045.

420 n. 257. Code provision is now Cons. Laws, c. 43, § 347.

420 n. 258. *McDonald v. McDonald*, 120 App. Div. 367, 105 N. Y. Supp. 277.

**421** n. 261. See *People v. McClellan*, 119 App. Div. 416, 104 N. Y. Supp. 447.

**421** n. 262. *Holly v. Gibbons*, 176 N. Y. 520; 68 N. E. 889; *Rothbarth v. Herzfeld*, 159 App. Div. 733, 144 N. Y. Supp. 974.

**422** n. 266. *Gittleman v. Feltman*, 191 N. Y. 205, 83 N. E. 969. *Schun v. Brooklyn Heights R. Co.* is officially reported in 82 App. Div. 560. It has been held that in an action at law, where a money judgment alone is sought, a plaintiff can neither be compelled nor permitted, under the provisions of section 452 of the Code of Civil Procedure, to bring in other parties than those he chose originally to make defendants. *Ten Eyck v. Keller*, 99 App. Div. 106, 91 N. Y. Supp. 169. A later case, however, holds that in an action on a joint contract, plaintiff may be permitted to join a joint obligor as a necessary defendant, after a demurrer has been sustained for defect of parties. *Haskell v. Moran*, 118 App. Div. 810, 103 N. Y. Supp. 667.

**422** n. 267. Defendant cannot compel plaintiff in a law action to bring in third persons to litigate an equitable counterclaim. *Deiches v. Western Development Co.*, 157 App. Div. 676, 142 N. Y. Supp. 933.

**422** n. 268. See *Haskell v. Moran*, 118 App. Div. 810, 103 N. Y. Supp. 667, where the cases are reviewed. The Supreme Court, on the motion of plaintiff, in an action for personal injuries, has "power" to bring in a new additional defendant against his objections and those of the original defendants, but its action is discretionary. *Gittleman v. Feltman*, 191 N. Y. 205, 83 N. E. 969 [affirming 122 App. Div. 385, 106 N. Y. Supp. 839]. *Contra*, *Horan v. Bruning*, 116 App. Div. 482, 101 N. Y. Supp. 986.

**423** n. 272. *Pope v. Manhattan R. Co.* is officially reported in 79 App. Div. 583. *Welde v. New York & H. R. Co.*, 108 App. Div. 286, 95 N. Y. Supp. 728. Where the owner of two lots who has sued to enjoin the maintenance

of a railroad on a street in front thereof, conveys one of the lots, his motion to bring in the grantee should be denied. *Id.* *Pope v. Manhattan R. Co.*, 79 App. Div. 583, 80 N. Y. Supp. 316.

423 § 438. A lessee pending the suit, may be brought in as defendant, on motion of plaintiff, in an injunction suit against the lessor. *Farley v. Manhattan R. Co.*, 117 App. Div. 248, 102 N. Y. Supp. 330.

425 n. 284. But see *Haskell v. Moran*, 118 App. Div. 810, 102 N. Y. Supp. 388.

426 n. 289. The power to bring in as a party a purchaser pendente lite is not limited to an application before judgment. *H. Koehler & Co. v. Brady*, 82 App. Div. 279, 288, 81 N. Y. Supp. 695.

426 n. 290. *Lederer v. Adler*, 51 Misc. 572, 101 N. Y. Supp. 53.

426 n. 292. *Lehrer v. Walcoff*, 47 Misc. 112, 93 N. Y. Supp. 540.

427 n. 294. An order requiring the services of an amended and supplemental summons by publication, where such summons requires the new defendant to answer the complaint, i. e., the amended complaint, is sufficient. *Meeks v. Meeks*, 87 App. Div. 99, 84 N. Y. Supp. 67.

428 n. 303. *Callanan v. Keeseville, etc., R. Co.*, 48 Misc. 476, 95 N. Y. Supp. 513.

428 n. 307. So the court may permit an infant to intervene, though he is neither a necessary or proper party, where the interests of the infant will otherwise not be properly guarded. *Mertens v. Mertens*, 87 App. Div. 295, 84 N. Y. Supp. 352 [distinguished in *Honigbaum v. Jackson*, 97 App. Div. 527, 90 N. Y. Supp. 182]. But the inherent power of the court to allow a person to intervene, if it exists, will not be exercised except in case of special circumstances. *Honigbaum v. Jackson*, 97 App. Div. 527, 90 N. Y. Supp. 182.

**429 § 449.** Strike out last sentence and insert: "The statute does not apply to an action in which a money judgment only is sought and where no title to property is involved." (See pp. 430, 431, note 322, and additional cases under **431**, n. 322 in this Appendix.)

**429 n. 314.** See also *Friedman v. Schreiber*, 50 Misc. 617, 98 N. Y. Supp. 235. But see *Oppenheimer v. New York*, 149 App. Div. 172, 175, 133 N. Y. Supp. 741, 743. The right is absolute, in the absence of laches. *Draper v. Pratt*, 43 Misc. 406, 89 N. Y. Supp. 356.

**430 § 452.** One not competent to be a party to an action at its commencement will not be permitted to intervene. *Coyne v. Yonkers*, 57 Misc. 366, 109 N. Y. Supp. 625. "The section in question contemplates a case where a person has an immediate and present interest in the subject of the action, \* \* \*. It was not intended to confer the right to be made a party upon one who may in the future acquire some lien by judgment or execution in the event of a successful outcome of a lawsuit. Such contingencies are altogether too remote and uncertain to be held to confer a present legal or equitable interest in mortgaged property. Particularly is this true where the liability of the defendant to the moving party is contested." And an alleged creditor of a corporation, having no lien on or interest in the corporation's property covered by a trust mortgage, is not entitled to intervene and defend a foreclosure suit. *Clinton v. South Shore Natural Gas & Fuel Co.*, 61 Misc. 339, 113 N. Y. Supp. 289. Legislature has power to permit intervention by people of state in proceeding relating primarily to private interests. *Barkenthein v. People*, 155 App. Div. 285, 140 N. Y. Supp. 100. Person having no interest in real estate involved is not entitled to intervene because of interest in question involved. *People v. Fisher*, 209 N. Y. 392, 103 N. E. 734. In action to enjoin removal of sand and gravel, see *Strawberry Island Co. v. Cowles*, 79 Misc.

279, 140 N. Y. Supp. 333. In action to annul a marriage. *Tysen v. Tysen*, 137 App. Div. 134, 121 N. Y. Supp. 962. A creditor of a defendant in a mortgage foreclosure suit is not entitled to intervene. *Bouden v. Long Acre Square Bldg. Co.*, 92 App. Div. 325, 86 N. Y. Supp. 1080. So a third person is not entitled to intervene in a foreclosure suit where the defendant merely alleges payment and denies the assignment to plaintiff of the bond and mortgage, since the action neither involves title to real property nor to specific tangible personal property. *Draper v. Pratt*, 43 Misc. 406, 89 N. Y. Supp. 356.

**431.** In injunction suit, a private citizen having no special relation to or interest in the litigation has no right to intervene as a defendant. *Hapgoods v. Bogart*, 124 App. Div. 875, 109 N. Y. Supp. 537. That the person seeking to intervene is represented in the action by a receiver is no ground for refusing the application where his rights are liable to be prejudiced by a settlement of the action. *Hosmer v. Darrah*, 85 App. Div. 485, 83 N. Y. Supp. 413.

**431 n. 322.** Followed in *Long v. Burke*, 105 App. Div. 457, 94 N. Y. Supp. 277; *Honigbaum v. Jackson*, 97 App. Div. 527, 90 N. Y. Supp. 182; *Westinghouse, Church, Kerr & Co. v. Wyckoff*, 81 App. Div. 294, 81 N. Y. Supp. 49; *City of Ironwood v. Coffin*, 39 Misc. 278, 79 N. Y. Supp. 502. Rule applied to suit in equity, where substantially for a legal remedy. *Hay v. Brookfield*, 160 App. Div. 277, 145 N. Y. Supp. 543.

**431 n. 329.** It is not sufficient to show merely a possibility of an interest in the property. *Van Williams v. Elias*, 106 App. Div. 288, 94 N. Y. Supp. 611.

**432 n. 334.** *Schlesinger v. Bear*, 128 App. Div. 494, 112 N. Y. Supp. 826.

**433 § 453.** The application cannot be made by a party to the action. *Goldstein v. Shapiro*, 85 App. Div. 83, 82 N. Y. Supp. 1038.



**433 n. 344.** See *Goff v. O'Rourke*, 123 App. Div. 918, 107 N. Y. Supp. 1041.

**433 n. 350.** Cannot limit time of intervener to plead to three days. *Curtis v. Goldberg*, 137 App. Div. 10, 121 N. Y. Supp. 817. It is believed that while ordinarily the right to intervene, where the applicant brings himself within the Code provision, is absolute, so that the order can impose no terms, yet where the applicant has been guilty of laches in moving, terms may be imposed, as they may where the intervention is allowed because of the inherent power of the court. In *Hosmer v. Darrah*, 85 App. Div. 485, 83 N. Y. Supp. 413, terms were imposed though the right to intervene would seem to have been absolute. In any event, the court cannot require the intervening defendant to appear and defend through the attorney employed by the other defendants. *O'Connor v. Hendrick*, 90 App. Div. 432, 86 N. Y. Supp. 1.

## CHAPTER VI

### TIME OF COMMENCING ACTIONS

**440 n. 10.** See *Treadwell v. Clark*, 190 N. Y. 51, 82 N. E. 505.

**441 n. 14.** Parties to insurance contract may prescribe a shorter time. *Williams v. Fire Ass'n of Philadelphia*, 119 App. Div. 573, 104 N. Y. Supp. 100; *Tolmie v. Fidelity & Casualty Co.*, 95 App. Div. 352, 357, 88 N. Y. Supp. 717. In *Wetyen v. Fick*, 178 N. Y. 223, 70 N. E. 497, it is held that section 401 of the Code which provides that limitations do not run during the time the defendant is without the state, where he is without the state at the time the cause of action accrues, does not apply to an action for dower since "a different limitation is expressly prescribed by law," i. e., by section 1596 of the Code, so that the provisions of chapter four of the Code do not apply.

441 n. 15. *Winter v. Niagara Falls*, 119 App. Div. 586, 104 N. Y. Supp. 39; *People ex rel. McCabe v. Snedeker*, 106 App. Div. 89, 94 N. Y. Supp. 319. To same effect, *Conolly v. Hyams*, 176 N. Y. 403. As where period of limitation is fixed by insurance policy. *O'Neil v. Franklin Fire Ins. Co.*, 159 App. Div. 313, 145 N. Y. Supp. 432. The cases cited in this note are distinguished in *Wetyen v. Fick*, 178 N. Y. 223, 70 N. E. 497, which must be held to modify the rule laid down in the text as supported by the cases cited, at least in so far as the action for dower is concerned, i. e., the *Wetyen* case holds that none of the general Code provisions as to limitations apply to an action for dower but that section 1596 alone governs. The statute fixing a one-year limitation for negligence suits against a municipality having 50,000 inhabitants or over is subject to section 396 of the Code suspending the time during the existence of any of the disabilities specified therein. *McKnight v. New York*, 186 N. Y. 35, 78 N. E. 576 [reversing 98 App. Div. 622, 90 N. Y. Supp. 1105], overruling *Norton v. New York*, 16 Misc. 303, 38 N. Y. Supp. 90. See also *In re Cashman*, 116 N. Y. Supp. 1128.

442 n. 19. *Bellinger v. German Ins. Co.*, 51 Misc. 463, 100 N. Y. Supp. 424 (holding that section 405 of the Code applies to limitations governed by contract). But see *Wetyen v. Fick*, 178 N. Y. 223, 70 N. E. 497 (as already explained in preceding paragraph).

442 n. 21. *Devoe v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339. An executor who has duly qualified and received assets of his testator's estate, for which he has never accounted, is so far a trustee as to bring him within the rule that the statute of limitations does not commence to run in favor of a trustee, against one otherwise entitled to an account, until such trustee has repudiated his trust. *In re Ashheim's Estate*, 185 N. Y. 609, mem. 78 N. E. 1099 [affirming on this point 111 App. Div. 176, 97 N. Y. Supp.

607]; *In re Anderson*, 122 App. Div. 453, 106 N. Y. Supp. 818.

443 n. 22. *Putnam v. Lincoln Safe Deposit Co.*, 49 Misc. 578, 100 N. Y. Supp. 101.

443 n. 26. *Contra*, *Matter of Asheim's Estate*, 111 App. Div. 176, 97 N. Y. Supp. 607 [affirmed in 185 N. Y. 609, 78 N. E. 1099.]

443 n. 29. Rule applied to short statute of limitations where claim rejected by executor. *Van Ness v. Kenyon*, 208 N. Y. 228, 101 N. E. 881. But in action by physician for services, malpractice may be set up as a defense although barred by limitations as an affirmative cause of action. *Marsh v. Richer*, 68 Misc. 587, 125 N. Y. Supp. 245.

444 n. 32. *Lightfoot v. Davis*, 198 N. Y. 261, 91 N. E. 582; *People v. Freeman*, 110 App. Div. 605, 97 N. Y. Supp. 343.

445 n. 41. *Johnson v. Phoenix Bridge Co.*, 133 App. Div. 807, 118 N. Y. Supp. 88; *Colell v. Delaware, L. & W. R. Co.*, 80 App. Div. 342, 80 N. Y. Supp. 675.

445 n. 42. *Kelly v. Prudential Ins. Co. of America*, 119 N. Y. Supp. 154. But by-laws of a fraternal insurance order cannot be changed, after the application for membership of a person, so as to shorten the time to sue, where he does not consent thereto. *Butler v. Supreme Council A. L. H.*, 105 App. Div. 164, 93 N. Y. Supp. 1012.

446 § 459. The words "laws of his residence" mean the residence of the debtor at the time the cause of action accrued rather than at the time when the action was commenced. *Utah Nat. Bank v. Jones*, 109 App. Div. 526, 96 N. Y. Supp. 338.

447 n. 51. *Smith v. Western P. R. Co.*, 154 App. Div. 130, 139 N. Y. Supp. 129.

448 n. 56. See also *Utah Nat. Bank v. Jones*, 109 App. Div. 526, 96 N. Y. Supp. 338.

448 n. 57. *Shipman v. Treadwell*, 208 N. Y. 404, 102 N. E.

634, 150 App. Div. 57, 133 N. Y. Supp. 970; *Isenberg v. Rainier*, 70 Misc. 498, 127 N. Y. Supp. 411. Compare *Piper v. Hayward*, 71 Misc. 41, 127 N. Y. Supp. 240. Code provisions applied in *Chesapeake Coal Co. v. Menges*, 102 App. Div. 15, 92 N. Y. Supp. 1003; *Holmes v. Hengen*, 41 Misc. 521, 85 N. Y. Supp. 35. Foreign statute must be proved. *Duryee v. Sunlight Gas, etc., Co.*, 74 Misc. 440, 132 N. Y. Supp. 407.

**448 § 460.** "It is well settled that a statute of limitations intended as a retrospective law must give a person reasonable time to enforce a remedy available to him before the bar of the statute will apply. In this case the statute gives a period of six months and that time has been recognized by the courts as reasonable." *Halsted v. Silberstein*, 196 N. Y. 1, 15, 89 N. E. 443. Limitation statute must give a reasonable time after its enactment for the enforcement of existing rights. *People ex rel. Staples v. Sohmer*, 150 App. Div. 8, 134 N. Y. Supp. 543.

**448 n. 58.** Changing the limitation of the time to sue officers of a corporation for failure to file an annual report, from three years to six months, is not void as interfering with an existing property right. *Davidson v. Witthaus*, 106 App. Div. 182, 94 N. Y. Supp. 428. But provisions of contract cannot be annulled by limitation statute. *Adam v. Manhattan Life Ins. Co.*, 204 N. Y. 357, 97 N. E. 740.

**449 n. 61.** Six months held a reasonable time where limitation of actions for failure of officers of corporation to file their annual report was changed from three years to six months. *Davidson v. Witthaus*, 106 App. Div. 182, 94 N. Y. Supp. 428.

**449 n. 64.** Matter of Moench's Estate, 39 Misc. 480, 80 N. Y. Supp. 222; Matter of Guttoff's Estate, 39 Misc. 483, 80 N. Y. Supp. 219.

**451 § 463.** The fact that notes are barred by limitations

does not prevent an action against the grantee of land who has assumed their payment out of the proceeds of the land. *Greenley v. Greenley*, 114 App. Div. 640, 100 N. Y. Supp. 114.

**451** n. 73. *Lightfoot v. Davies*, 198 N. Y. 261, 91 N. E. 582.

**453** § 466. That a trustee de son tort cannot set up the statute, see *Putnam v. Lincoln Safe Deposit Co.*, 118 App. Div. 468, 104 N. Y. Supp. 4.

**454** n. 89. A stranger cannot rely on the statute. *Perry v. Williams*, 40 Misc. 57, 81 N. Y. Supp. 204. The successor of a municipal corporation may plead the statute the same as could its predecessor. *Kahrs v. New York*, 98 App. Div. 233, 90 N. Y. Supp. 793. The defense of limitations may be set up by the assignee of a second mortgage in an action to reform the discharge of a first mortgage and to foreclose such mortgage. *Perry v. Fries*, 90 App. Div. 484, 85 N. Y. Supp. 1064.

**454** n. 95. The proposition that "a foreign corporation sued in the state court can avail itself of the statute of limitations" should read "cannot," and the cases cited so hold and are followed in *Gray Lith. Co. v. American Watchman's Time Detector Co.*, 44 Misc. 206, 88 N. Y. Supp. 857. But where a foreign corporation has complied with the Code provision for service of summons on it by delivering the summons to a resident designated by such corporation for the purpose, it may plead limitations based on the failure to sue while the designation was in force. *Wehrenberg v. New York, N. H. & H. R. Co.*, 124 App. Div. 205, 108 N. Y. Supp. 704.

**455** § 468. What constitutes, see *Watertown Nat. Bk. v. Bagley*, 134 App. Div. 831, 119 N. Y. Supp. 592.

**455** n. 103. *Watertown Nat. Bank v. Bagley*, 62 Misc. 380, 116 N. Y. Supp. 772. Compare *Young v. Ingalsbe*, 138 App. Div. 587, 122 N. Y. Supp. 707.

**456** n. 108. *Hamlin v. People*, 155 App. Div. 680, 140 N. Y. Supp. 643.

**458** n. 118. Construction of section 1499 of the Code, see post, **484** n. 292.

**460**. There must be an adverse entry. *Hindley v. Manhattan R. Co.*, 103 App. Div. 504, 93 N. Y. Supp. 53.

**460** n. 132. Possession under a tax lease is not adverse. *Miller v. Warren*, 94 App. Div. 192, 87 N. Y. Supp. 1011.

**462** n. 139. Piles driven outside of a dock, but not used, do not constitute a substantial inclosure. *Fortier v. Delaware, L. & W. R. Co.*, 93 App. Div. 24, 86 N. Y. Supp. 896.

**465** n. 147. *Scallon v. Manhattan R. Co.*, 185 N. Y. 359, 78 N. E. 284; *Mills v. Thompkins*, 47 Misc. 455, 95 N. Y. Supp. 962; *Taggart v. Manhattan R. Co.*, 57 Misc. 184, 109 N. Y. Supp. 38; *Goggin v. Manhattan R. Co.*, 124 App. Div. 644, 109 N. Y. Supp. 83. The date of the coming of age of the infant is the starting point. *Muller v. Manhattan R. Co.*, 124 App. Div. 295, 108 N. Y. Supp. 852.

**465** n. 150. Statute does not apply where limitations commenced running before death. *Lewine v. Gerardo*, 60 Misc. 261, 112 N. Y. Supp. 192.

**467** n. 164. The amendment of 1894 extended the twenty-year rule to judgments of courts not of record "thereafter" docketed with the county clerk. *Matter of Guttroff's Estate*, 39 Misc. 483, 80 N. Y. Supp. 219.

**467** n. 165. The amendment of 1894 changing the limitation to twenty years does not apply to judgments rendered and transcripts filed prior to the passage of the amendment. *McMahon v. Arnold*, 107 App. Div. 132, 94 N. Y. Supp. 775.

**468** n. 166. The word "adverse" in the statute is used in its ordinary meaning. *Becker v. McCrea*, 193 N. Y. 423, 86 N. E. 463 [reversing 119 App. Div. 56, 103 N. Y. Supp. 963].

**468** n. 171. *Anguish v. Blair*, 160 App. Div. 52, 145 N. Y. N. Y. Practice—8

Supp. 392; *Mutual Life Ins. Co. v. United States Hotel Co.*, 82 Misc. 632, 144 N. Y. Supp. 476. But not an action to set aside a sealed instrument, such action being barred in ten years. *O'Donohue v. Smith*, 57 Misc. 448, 109 N. Y. Supp. 929.

**469.** Adding a seal to a promissory note, where no reference thereto in the note, does not extend the period of limitations from six to twenty years. *Matter of Pirie*, 198 N. Y. 209, 91 N. E. 587 [aff. 133 App. Div. 431].

**470 § 476.** Applies to action on the ground of fraud cognizable in equity. *Spallholz v. Sheldon*, 148 App. Div. 573, 132 N. Y. Supp. 560. Applies to creditor's action to enforce liability of stockholders. *Richards v. Gill*, 138 App. Div. 75, 122 N. Y. Supp. 620. Action to annul a marriage on ground of prior marriage is not barred in ten years. *Chittenden v. Chittenden*, 68 Misc. 172, 123 N. Y. Supp. 629. Action on judgment to charge joint debtor not served with process is barred in ten years from the date of the original judgment. *Hofferberth v. Nash*, 191 N. Y. 446, 84 N. E. 400 [affirming 117 App. Div. 284, 38 Civ. Proc. R. 259, 102 N. Y. Supp. 317]. A creditor's suit is barred in ten years. *Bergmann v. Lord*, 194 N. Y. 70, 86 N. E. 828 [affirming mem. decision in 122 App. Div. 921, 107 N. Y. Supp. 1121]. A suit to annul a deed made while plaintiff was an infant must be brought within ten years after reaching his majority. *O'Donohue v. Smith*, 130 App. Div. 214, 114 N. Y. Supp. 536.

**471 n. 192.** Code, § 1972, applied. *People v. Journal Co.*, 158 App. Div. 326, 143 N. Y. Supp. 389.

**471 n. 193.** *Beugger v. Ashley*, 161 App. Div. 577, 146 N. Y. Supp. 910. Applies only to actions in which equity has exclusive jurisdiction. *Hart v. Goadby*, 72 Misc. 232, 129 N. Y. Supp. 892. Applies to action to redeem pledged stock. *Treadwell v. Clark*, 190 N. Y. 51, 82 N. E. 505.

**472.** Actions relating to constructive trusts are barred in ten years. *Chormann v. Bachmann*, 119 App. Div. 146,

104 N. Y. Supp. 151. Ten-year limitation applies to action to set aside a judgment and proceedings thereunder for want of jurisdiction of the subject-matter. *Ford v. Clendenin*, 155 App. Div. 433, 140 N. Y. Supp. 1119. Action for fraudulent concealment barred in ten years. *Clarke v. Gilmore*, 149 App. Div. 445, 133 N. Y. Supp. 1047.

473 n. 214. *Hutchinson v. Sperry*, 158 App. Div. 704, 143 N. Y. Supp. 876. Action to recover possession of property from a trustee, where accounting involved. *Finnegan v. McGuffog*, 203 N. Y. 342, 96 N. E. 1015. It seems, however, that where there is a "demand due" the six-year statute applies. For instance, six years is the limitation where a beneficiary sues to recover a money judgment against the personal representatives of one acting in a fiduciary capacity. *Libby v. Van Derzee*, 80 App. Div. 494, 81 N. Y. Supp. 139. So a motion to compel an executor of a trustee to account for specific moneys which the trustee had received is a proceeding to recover a demand that is due and as such is not governed by the ten years' statute but is barred in six years in analogy to an action at law. *Matter of Cruikshank's Estate*, 40 Misc. 325, 81 N. Y. Supp. 1029, which refuses to follow *Matter of Longbotham*, 38 App. Div. 607, 57 N. Y. Supp. 118, in so far as it applies to all actions for an accounting

473 n. 215. *In re Lesser's Estate*, 119 App. Div. 507, 104 N. Y. Supp. 213; *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410. See also preceding paragraph.

473 n. 218. *Holt v. Hopkins*, 63 Misc. 537, 117 N. Y. Supp. 177.

474 n. 220. Actions on sealed instruments are not limited to six years. *New York v. Third Ave. R. Co.*, 42 Misc. 599, 605, 87 N. Y. Supp. 584. An action against the administrator of an executor to recover moneys collected by the executor, where no accounting is demanded, is an action on an implied contract which must be brought within six years.



Constantine v. Constantine, 91 App. Div. 607, 87 N. Y. Supp. 139. In action on an account stated, where the complaint showed that the items of the account extended over a period of more than seven years prior to the time the account was stated, and it did not necessarily appear that it was an open mutual running account against which the statute of limitations would not run until the date of the last item, and the account stated is not shown to be in writing or assented to in writing, and there is no allegation of an adjustment of differences constituting a consideration for the payment of outlawed claims, the statute of limitations may be interposed to those items against which the statute had run. Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. Supp. 129.

474 n. 224. This six-year limitation is not affected by Laws 1896, c. 910, which provides that when an assessment has been annulled by judgment, the amount thereof may be refunded, and if not refunded within one year from such judgment an action may be brought to recover the same. Dennison v. New York, 182 N. Y. 24, 74 N. E. 486.

475 n. 226. Matter of Grade Crossing Commrs., 201 N. Y. 32, 94 N. E. 188 (damages from change of grade).

476 n. 238. Gabriel v. Gabriel, 79 Misc. 346, 139 N. Y. Supp. 778.

477 n. 239. Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582.

477 n. 240. Holland v. Grote, 125 App. Div. 413, 109 N. Y. Supp. 787.

477 n. 245. Deitch v. Deitch, 161 App. Div. 492, 146 N. Y. Supp. 782.

478 n. 247. Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192. What constitutes discovery, see Gouch v. Gouch, 69 Misc. 436, 127 N. Y. Supp. 476.

479 n. 261. An action to recover the statutory penalty against a street car company for refusal to give a trans-

fer must be brought within three years. *Munro v. Brooklyn Heights R. Co.*, 195 N. Y. 254, 88 N. E. 567 [affirming 120 App. Div. 516, 105 N. Y. Supp. 325]. Quære, whether action by veteran for damages in reducing his compensation with the intent to bring about his resignation, is within this section. *Hilton v. Cram*, 112 App. Div. 35, 97 N. Y. Supp. 1123.

480 n. 262. This limitation of three years is changed to six months by Laws 1901, c. 354, which applies to a right of action accruing under the prior laws. *Davidson v. Witthaus*, 106 App. Div. 182, 94 N. Y. Supp. 428.

480 n. 264. This Code provision applies to directors and stockholders of foreign as well as domestic corporations. *Platt v. Wilmot*, 193 U. S. 602. A "moneyed corporation" is a corporation having banking powers or the power to make loans on pledges or deposits, or authorized by law to make insurances. *Id.* The liability is created, "by the common law or by statute" where the statute is the foundation for the implied contract arising from the purchase of or subscription for stock. *Id.*

481 n. 270. *Morales v. Klopsch*, 158 App. Div. 824, 143 N. Y. Supp. 922.

481 n. 272. If action barred in lifetime of injured person, an action for his death by his personal representative is barred. *Kelliher v. New York C. & H. R. R. Co.*, 153 App. Div. 617, 138 N. Y. Supp. 894; *Casey v. Auburn Tel. Co.*, 155 App. Div. 66, 139 N. Y. Supp. 579. Injuries from failure of street railway to keep street in repair. *Hayes v. Brooklyn Heights R. R. Co.*, 200 N. Y. 183, 93 N. E. 469.

482 n. 278. The words "personal injuries," as used in this statute, include injuries resulting in death, and apply to actions authorized by section 1902 of the Code, if against municipalities having 50,000 inhabitants or over. *Titman v. New York*, 57 Hun, 469, 10 N. Y. Supp. 689; *Littlewood*

v. New York, 89 N. Y. 24; Curry v. Buffalo, 57 Hun, 25, 10 N. Y. Supp. 392; Crapo v. Syracuse, 98 App. Div. 376, 90 N. Y. Supp. 553.

**483 n. 286.** Hughes v. New York, O. & W. R. Co., 158 App. Div. 443, 143 N. Y. Supp. 603, and see ante, **481 n. 272**; Kelliher v. New York C. & H. R. R. Co., 77 Misc. 330, 136 N. Y. Supp. 256. The limitation of two years specified in section 1902 of the Code, within which an action for negligence resulting in death must be commenced, was changed by chapter 572, p. 801, of the Laws of 1886, when brought against a city in the state having 50,000 inhabitants or over. As to such actions the limitation is one year after the cause of action accrues, the act superseding and taking the place of the provision of the Code in that regard. Crapo v. Syracuse, 98 App. Div. 376, 90 N. Y. Supp. 553 [reversed on other grounds in 183 N. Y. 395].

**483 n. 287.** Actions to enforce liability of stockholders. Van Tuyl v. Robin, 80 Misc. 360, 142 N. Y. Supp. 535.

**483 n. 288.** Tiffany v. Harvey, 158 App. Div. 159, 143 N. Y. Supp. 31; Kirschberg v. Coghlan, 62 Misc. 629, 115 N. Y. Supp. 1078.

**484 n. 290.** Charter provision as to injuries to personal property, see Scranton & L. Coal Co., 155 App. Div. 453, 140 N. Y. Supp. 441. Under New York Charter, see Harms v. New York, 69 Misc. 315, 125 N. Y. Supp. 477.

**484 n. 292.** Action under Employers' Liability Act. Judd v. Lake Shore & M. S. R. Co., 155 App. Div. 1, 139 N. Y. Supp. 542. Action to recover usury paid. Landeker v. Property Secur. Co., 79 Misc. 157, 140 N. Y. Supp. 745. Section 1499 of the Code only applies where the owners of both pieces of land have erected buildings whose walls abut one on the other, and who have thereby apparently made a practical location of the boundary line. Bergman v. Klein, 97 App. Div. 15, 89 N. Y. Supp. 624.

**484 § 482.** Cause of action on statute does not accrue

before the statute goes into effect. *Cary v. Koerner*, 200 N. Y. 253, 93 N. E. 979.

**485.** Limitations begin to run not from the time of death, in an action to recover damages for causing death by wrongful act, but from the date of issuing letters of administration. *Crapo v. Syracuse*, 183 N. Y. 395, 76 N. E. 465 [reversing on this point, 98 App. Div. 376, 90 N. Y. Supp. 553]. Service by mail of notice of rejection of claim is a sufficient service to start running the six months within which an action must be brought on a claim against a decedent. *Heinrich v. Heidt*, 106 App. Div. 179, 94 N. Y. Supp. 423. Lapse of time is never a bar to a claim against the state so long as there is no tribunal to which the claim may be presented and by which it may be passed on and payment awarded. *People ex rel. Essex County v. Miller*, 181 N. Y. 439, 446, 74 N. E. 477. A cause of action in favor of an infant to impress a trust on real estate purchased at a foreclosure sale by his guardian accrues at the time of the purchase and not at the time the infant reaches his majority. *Cahill v. Seitz*, 93 App. Div. 105, 86 N. Y. Supp. 1009.

**486** n. 301. Creditor's suit, see *Bergmann v. Lord*, 194 N. Y. 70, 86 N. E. 828 [affirming mem. decision in 122 App. Div. 921, 107 N. Y. Supp. 1121].

**487** § 484. See *Curran v. Hosey*, 153 App. Div. 557, 138 N. Y. Supp. 910.

**488** § 485. When trust terminates, limitations begin to run. *Finnegan v. McGuffog*, 203 N. Y. 342, 96 N. E. 1015.

**488** n. 314. *Anderson v. Fry*, 116 App. Div. 740, 102 N. Y. Supp. 112.

**489** n. 315. *Barney v. Hoyt*, 150 App. Div. 361, 135 N. Y. Supp. 126; *Matter of Wood*, 70 Misc. 467, 128 N. Y. Supp. 1102. See also *Boskowitz v. Sulzbacher*, 139 App. Div. 899, 123 N. Y. Supp. 508. Limitations do not run in favor of an executor so as to bar an action for an accounting which involves the construction of the will, where the executor has

not repudiated his trust but has merely made a mistake in his interpretation of the will. *Thorn v. De Breteuil*, 86 App. Div. 405, 433-435, 83 N. Y. Supp. 849. A trustee who sets up limitations as a defense must allege not only lapse of time but also such lapse of time after a repudiation of the trust. *Matter of Meyer's Estate*, 98 App. Div. 7, 90 N. Y. Supp. 185.

489 n. 316. *Hart v. Goadby*, 72 Misc. 232, 129 N. Y. Supp. 892.

490 § 486. Demand as necessary as to cause of action against a stockholder on a stock certificate, in favor of trustee in bankruptcy, see *Southworth v. Morgan*, 143 App. Div. 648, 128 N. Y. Supp. 196. Demand not necessary in case of conversion. *Morales v. Klepsch*, 158 App. Div. 824, 143 N. Y. Supp. 922.

491 n. 329. *Holt v. Hopkins*, 63 Misc. 537, 117 N. Y. Supp. 177.

492 n. 332. *Glover v. National Bank*, 156 App. Div. 247, 141 N. Y. Supp. 409.

492 n. 334. *Matter of Meyer's Estate*, 98 App. Div. 7, 90 N. Y. Supp. 185.

493. Where a certificate of stock is deposited as collateral but the identical certificate is to be returned on the payment of the principal obligation, the statute does not begin to run against an action to recover the stock until after a demand for the return of the stock. *Brown v. Bronson*, 93 App. Div. 312, 318, 87 N. Y. Supp. 872.

494 n. 346. An action by a ward to recover a money judgment against the executors of her general guardian must be brought within six years after the ward comes of age, without regard to when the ward learned that the guardian had received money not accounted for. *Libby v. Van Derzee*, 80 App. Div. 494, 81 N. Y. Supp. 139. Limitations begin to run against a cause of action to recover damages for the failure of an attorney to record a

mortgage as he had agreed to from the date of the breach of the agreement, and not from the date of the discovery thereof. *Crowley v. Johnston*, 96 App. Div. 319, 89 N. Y. Supp. 258.

494 n. 348. *Manahan v. Holmes*, 58 Misc. 86, 110 N. Y. Supp. 300.

494 n. 349. See also *Perry v. Williams*, 40 Misc. 57, 81 N. Y. Supp. 204. The statute does not commence to run when the instrument is delivered. *Brennan v. Thompson*, 46 Misc. 317, 94 N. Y. Supp. 684.

494 n. 350. *Lightfoot v. Davis*, 116 N. Y. Supp. 904.

495. No duty of actual vigilance to discover an unexposed fraud. *Spallholz v. Sheldon*, 148 App. Div. 573, 132 N. Y. Supp. 560.

495 n. 352. *Beugger v. Ashley*, 161 App. Div. 577, 146 N. Y. Supp. 910; *Ulman v. Equitable Life Ass. Soc.*, 161 App. Div. 708. Applies only where actual fraud is the gravamen of the action and not where the fraud is merely constructive or incidental. *Hart v. Goadby*, 72 Misc. 232, 129 N. Y. Supp. 892. Adding unnecessary allegation of fraud does not bring case within statute. *Glover v. National Bank*, 156 App. Div. 247, 141 N. Y. Supp. 469. As to constructive fraud, limitations run from the occurrence of the act or omission. *Spallholz v. Sheldon*, 158 App. Div. 367, 143 N. Y. Supp. 417. The rule applies to an action to recover lands and for an accounting where an administrator permitted lands of the estate to be sold for taxes, though he had personalty in hand to pay the taxes, and himself bid them in and took a tax title in his own name. *Kelly v. Pratt*, 41 Misc. 31, 83 N. Y. Supp. 636. But the rule does not apply to an action by the owners of the equity of redemption to avoid a foreclosure deed, in which the guardian ad litem of infant defendants was the purchaser, and to declare the trust. *Dugan v. Sharkey*, 89 App. Div. 161, 85 N. Y. Supp. 778.

**496** n. 356. *Beattys v. Straiton*, 142 App.\* Div. 369, 126 N. Y. Supp. 848; *Coffin v. Barber*, 115 App. Div. 713, 101 N. Y. Supp. 147; *Slayback v. Raymond*, 93 App. Div. 326, 87 N. Y. Supp. 931.

**496** § 488. Account must be mutual. *Klein Wagon Works v. Hencken-Willenbrock Co.*, 67 Misc. 425, 123 N. Y. Supp. 119. Account need not be kept in debit and credit form nor by only one of the parties. *Miller v. Longshore*, 147 App. Div. 214, 131 N. Y. Supp. 1041.

**496** n. 360. Otherwise where accounts not mutual. *Elwood v. Hughes*, 109 N. Y. Supp. 25.

**497** n. 361. *Meehan v. Figliuolo*, 88 N. Y. Supp. 920.

**498** n. 367. *Fox v. Patachnikoff*, 75 Misc. 113, 132 N. Y. Supp. 840.

**499** n. 375. Provision applies only to an action and not to a special proceeding to compel payment of a legacy. *Matter of Toms*, 84 Misc. 312, 147 N. Y. Supp. 550.

**500** n. 377. See also *Brown v. Bronson*, 93 App. Div. 312, 316, 87 N. Y. Supp. 872.

**503** n. 393. See *Gibbons v. Bush Co.*, 115 App. Div. 619, 101 N. Y. Supp. 721.

**503** n. 395. Rule applied to action by creditor against heirs to enforce an indebtedness of the decedent. *Hill v. Moore*, 131 App. Div. 365, 115 N. Y. Supp. 289.

**505** § 500. Immaterial that plaintiff may commence an action by substituted service of summons. *Ackerman v. Ackerman*, 200 N. Y. 72, 93 N. E. 192 [aff. 123 App. Div. 750]. Burden of proving presence in the state, see *Goldberg v. Lackshin*, 139 N. Y. Supp. 943.

**505** n. 406. This Code rule does not apply to an action for dower. *Wetyen v. Fick*, 178 N. Y. 223, 70 N. E. 497.

**505** n. 407. *Smith v. Western P. R. Co.*, 154 App. Div. 130, 139 N. Y. Supp. 129.

**505** n. 409. The burden of showing his time of residence

within the state is on defendant. *Phillips v. Lindley*, 112 App. Div. 283, 98 N. Y. Supp. 423.

**506** n. 416. *Lawrence v. Hogue*, 105 App. Div. 247, 93 N. Y. Supp. 998.

**507** n. 417. *Holt v. Hopkins*, 63 Misc. 537, 117 N. Y. Supp. 177.

**508** n. 425. *In re Van Voorhees' Estate*, 55 Misc. 185, 106 N. Y. Supp. 354.

**509** n. 432. *Semon v. Daggett*, 62 Misc. 55, 114 N. Y. Supp. 763.

**509** § 502. As to what constitutes a voluntary discontinuance, see *Banister v. Michigan Mut. Life Ins. Co.*, 111 App. Div. 765, 97 N. Y. Supp. 843.

**510** n. 434. See *Clifford v. Duffy*, 56 Misc. 667, 107 N. Y. Supp. 809. This Code rule applies to an action to foreclose a mechanic's lien, though the period of limitations is governed by the lien law. *Conolly v. Hymans*, 176 N. Y. 403. It also applies to special proceedings. So held where the relator mistook his remedy in bringing mandamus instead of certiorari. *People ex rel. McCabe v. Snedeker*, 106 App. Div. 89, 94 N. Y. Supp. 319. An action on an insurance policy to recover the amount awarded on an appraisal of the amount of loss under its terms is brought "for the same cause" as a prior action in which fraud in the appraisal was alleged and plaintiff sought to recover the face of the policy. *Bellinger v. German Ins. Co.*, 51 Misc. 463, 100 N. Y. Supp. 424. Not sufficient to bring suit in City Court of New York which was without jurisdiction. *Gaines v. New York*, 156 App. Div. 789, 142 N. Y. Supp. 401 [aff. 78 Misc. 126, 137 N. Y. Supp. 964]. Discontinuance by virtue of a stipulation signed by both parties held not a voluntary discontinuance within this provision. *O'Neil v. Franklin Fire Ins. Co.*, 159 App. Div. 313, 145 N. Y. Supp. 432.

**511** § 503. See ante, **441** n. 15. The Code provision applies,



in so far as infants are concerned, only when the cause of action has accrued during infancy. *O'Donohue v. Smith*, 130 App. Div. 214, 114 N. Y. Supp. 536. Rule applied to infant. *Gabriel v. Gabriel*, 79 Misc. 346, 139 N. Y. Supp. 778. When limitations begin to run against an infant, see *Ford v. Clendenin*, 155 App. Div. 433, 140 N. Y. Supp. 1119.

**511 n. 440.** This exception is of general application and includes action by infants against a city for personal injuries. *Winter v. Niagara Falls*, 119 App. Div. 586, 104 N. Y. Supp. 39. It also applies to a special proceeding brought in behalf of an infant. *Matter of Pond's Estate*, 40 Misc. 66, 81 N. Y. Supp. 249.

**511 n. 443.** *Danziger v. Iron Clad Realty & Trading Co.*, 80 Misc. 510, 141 N. Y. Supp. 593. See also *Preusse v. Childwold Park Hotel Co.*, 134 App. Div. 383, 119 N. Y. Supp. 98. But see *Muller v. Manhattan R. Co.*, 53 Misc. 133, 102 N. Y. Supp. 454.

**513 n. 452.** One who claims under this exception must bring himself within it. *Beattys v. Straiton*, 142 App. Div. 369, 126 N. Y. Supp. 848.

**514 n. 455.** Legatees are "united in interest" so that service on one is sufficient in an action to determine the validity of a will. *Croker v. Williamson*, 208 N. Y. 480, 102 N. E. 588.

**514.** Where affidavit of inability to find defendant to serve summons on him is made before limitation has run, action is not barred. *Elwood v. Hughes*, 109 N. Y. Supp. 25. Where the only change effected by an amended summons and complaint was to correct the defect in the designation of the defendant company by striking out the words "as substituted trustee," etc., the action must be considered to have been commenced when the original summons was served. *Boyd v. United States Mortg. & Trust Co.*, 94 App. Div. 413, 88 N. Y. Supp. 289.

**515 n. 462.** But see *Landeker v. Property Secur. Co.*,

79 Misc. 157, 140 N. Y. Supp. 745. Owner of premises and contractor are not joint contractors as to a subcontractor not "otherwise united in interest." *Martens v. O'Neill*, 131 App. Div. 123, 115 N. Y. Supp. 260.

518 § 512. Writing word "renewed" on note is sufficient. *Maurice v. Fowler*, 78 Misc. 357, 138 N. Y. Supp. 425.

518 n. 482. *Doncourt v. Denton*, 55 Misc. 594, 105 N. Y. Supp. 906.

519 § 513. An acknowledgment made after the commencement of the action is sufficient. *Willis v. Wileman*, 53 Misc. 462, 102 N. Y. Supp. 1004.

519 n. 490. But it is not only the right, but the duty, of an executor, to pay the debts of the decedent, and his acknowledgment thereof, by making payments thereon from time to time, prevents the running of limitations where it has not run before such payments are made. *Holly v. Gibbons*, 176 N. Y. 520, 68 N. E. 889.

521. There is a sufficient acknowledgment and promise where defendant sent plaintiff's intestate a bill for services rendered to a third person, and intestate replied that the matter would have his earliest attention, and that he considered himself responsible for the bill. *Serrell v. Forbes*, 106 App. Div. 482, 94 N. Y. Supp. 805. But merely "looking over" an account does not remove the bar. *Matter of Goss*, 98 App. Div. 489, 90 N. Y. Supp. 769.

521 n. 497. *Willis v. Wileman*, 53 Misc. 462, 102 N. Y. Supp. 1004. See also *Zinn v. Stamm*, 78 Misc. 567, 139 N. Y. Supp. 992. An offer to give "a due bill as an acknowledgment" is sufficient. *Benedict v. Slocum*, 95 App. Div. 602, 88 N. Y. Supp. 1052.

522 n. 511. *Kahrs v. New York*, 98 App. Div. 233, 90 N. Y. Supp. 793.

523 n. 518. *Willis v. Wileman*, 53 Misc. 462, 102 N. Y. Supp. 1004. Where plaintiff bought shares of stock for defendant and paid in cash the market value, a letter, in

reply to a demand for payment of the indebtedness, stating, *inter alia*, that "you may rest assured that I will pay you every dollar I owe you within a short time. I am largely interested in a transaction at present; when that is closed up you will surely hear from me substantially," is sufficient as a new promise. *Levy v. Popper*, 106 App. Div. 394, 94 N. Y. Supp. 905. Must be definite. *Zinn v. Stamm*, 152 App. Div. 76, 136 N. Y. Supp. 737.

**523** n. 521. *Francis v. Rycroft*, 148 App. Div. 65, 132 N. Y. Supp. 14.

**525** § 518. Payment must be made under such circumstances as to indicate an intention to recognize the debt. *Matter of Sutton*, 159 App. Div. 21, 143 N. Y. Supp. 1072.

**525** n. 533. Part payment extends time. *Jefferson Co. Nat'l Bank v. Dewey*, 197 N. Y. 14, 90 N. E. 112.

**526** § 519. The test is whether the facts would support a plea of payment. A credit, in the debtor's books, to an account of a third person, not shown to have been authorized by the creditor, or to have been acquiesced in by him, is not such a payment as will bar the running of the statute. *Kirkpatrick v. Goldsmith*, 81 App. Div. 265, 80 N. Y. Supp. 835.

**526** n. 542. Drawing an order with instructions to "charge same to my account" does not revive outlawed claims where a claim not outlawed existed to which claim the payment might be applied. *Shafer v. Pratt*, 79 App. Div. 447, 80 N. Y. Supp. 109.

**527** n. 544. To same effect, *Van Name v. Barber*, 115 App. Div. 593, 100 N. Y. Supp. 987; *Sandel v. Sommers*, 131 App. Div. 537, 115 N. Y. Supp. 357.

**527** n. 545. *Murphy v. Walsh*, 113 App. Div. 428, 99 N. Y. Supp. 346. See *Greenwood v. Judson*, 109 App. Div. 398, 96 N. Y. Supp. 147; *Jefferson County Nat. Bank v. Dewey*, 181 N. Y. 98, 106, 73 N. E. 569. In the latter case the indorsers of a note paid the balance to the payee after a

judgment against the maker and a partial recovery against the maker by means of a creditor's suit. The note was delivered to the indorsers pending an appeal in the creditor's suit which resulted in the payee being required to refund the amount received in the creditor's action. It was held that the payments made by the indorsers were part payments so as to enable the payee to sue them for the balance remaining due where the action was brought within six years after such payments. See also *Cahn v. Reilly*, 113 N. Y. Supp. 545; *Cohen v. Diamond*, 74 Misc. 444, 132 N. Y. Supp. 355.

528 n. 546. *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 90 N. E. 834.

528 § 522. Payment by tenant in common, where agency for others is implied, is sufficient. *Clute v. Clute*, 197 N. Y. 439, 90 N. E. 988. Payment must be shown to have been made with the knowledge and acquiescence of the party liable. *Union Nat. Bank v. Dean*, 154 App. Div. 869, 139 N. Y. Supp. 835. Payment by wife of debtor, without his knowledge or consent, is not sufficient. *Mott v. Ingalsbe*, 136 App. Div. 140, 120 N. Y. Supp. 151. Payment of interest by the treasurer of the mortgagor corporation, receipts being taken acknowledging payment by the corporation, does not operate as a personal payment by him as surety. *Ulster County Sav. Inst. v. Deyo*, 116 App. Div. 1, 101 N. Y. Supp. 263.

528 n. 548. *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 90 N. E. 834; *Security Bank v. Finkelstein*, 160 App. Div. 315 (aff. on this point 76 Misc. 461, 135 N. Y. Supp. 640). In the latter case the court said: "So rigidly have the courts adhered to the underlying reason for this rule that it has been repeatedly held that a payment by one, jointly or otherwise liable with others on the same instrument, even with the knowledge of the others liable thereon and whose liability is thus reduced, suspends the running of the Statute

of Limitations only as against himself. *Hoover v. Hubbard*, 202 N. Y. 289; *Murdock v. Waterman*, *supra*; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *McMullen v. Rafferty*, 89 *id.* 456; *Harper v. Fairley*, *supra*. The only exceptions to the rule that a payment, in order to prevent the running of the statute, must be made by the debtor, who pleads the statute, are, where the payment is made by his authorized agent clothed with sufficient authority to disclaim for him any intention to have the effect given the payment which by legal inference or presumption would otherwise attach thereto and he fails to so disclaim; or where he ratifies a payment made in his behalf. *Pickett v. Leonard*, *supra*; *Harper v. Fairley*, *supra*; *Smith v. Ryan*, *supra*; *Murdock v. Waterman*, *supra*. It is well settled that where the debtor assigns collateral as security for his note or other obligation, his debtor, in making a payment to the assignee on the obligation thus assigned, is not his agent, and that such a payment does not give rise to a new promise on the part of the debtor (*Harper v. Fairley*, *supra*; *Smith v. Ryan*, *supra*; *Acker v. Acker*, 81 N. Y. 143); and the same has been held with respect to payment by a general assignee for creditors. *Pickett v. Leonard*, *supra*. It has also been held that the creditor in selling and applying the proceeds of collateral to the payment of the obligation is not the agent of the debtor for this purpose. *Brooklyn Bank v. Barnaby*, 197 N. Y. 210. In view of these authorities it requires no further argument to show that the receiver of the Cooper Exchange Bank in paying the dividends was not the agent of the defendant, and that there is no legal presumption or inference to be drawn from such payments that a new promise was then and there made by the debtor to pay the balance owing on the note." An unauthorized payment by the widow on a mortgage indebtedness upon property in which she has but a homestead and dower interest will not operate to remove the bar of the statute of limitations from the

indebtedness, as against the heirs who own the fee. *Nickell v. Tracy*, 100 App. Div. 80, 91 N. Y. Supp. 287. Payment by agent held sufficient. *Brooklyn Bank v. Barnaby*, 57 Misc. 195, 107 N. Y. Supp. 584.

528 n. 550. *Ulster County Sav. Inst. v. Deyo*, 116 App. Div. 1, 101 N. Y. Supp. 263; *Keese v. Dewey*, 111 App. Div. 17, 97 N. Y. Supp. 519. Part payment by one of the joint and several makers of a note does not affect the defense of the statute as to the others. *Hoover v. Hubbard*, 202 N. Y. 289, 95 N. E. 702.

529. Payments by life tenant, see *Bonhoff v. Wiehorst*, 57 Misc. 456, 108 N. Y. Supp. 437.

529 n. 552. *In re Neher's Estate*, 57 Misc. 527, 109 N. Y. Supp. 1090.

530 n. 561. *Akin v. Van Wirt*, 124 App. Div. 83, 108 N. Y. Supp. 327.

530 § 523. Payment of interest to the attorney of the creditor is sufficient. *Matter of Lowerre*, 48 Misc. 317, 96 N. Y. Supp. 764.

531 § 526. Burden of proving payments is on person so claiming. *Holden v. Cooney*, 110 N. Y. Supp. 1030.

532. An unsigned indorsement made after a note is outlawed is not sufficient to show part payment where the indorsement is not in the handwriting of the maker nor shown to have been made with his privity. *Matter of Salisbury*, 41 Misc. 274, 84 N. Y. Supp. 215.

532 n. 582. See also *Van Name v. Barber*, 115 App. Div. 593, 100 N. Y. Supp. 987.



## PART II

### PRACTICE RELATING TO ACTIONS GENERALLY, BUT NOT SUBJECT TO CHRONOLOGICAL ARRANGEMENT

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#### CHAPTER I

##### AFFIDAVITS AND OATHS

**535** n. 3. Allegations in a verified pleading, one of the moving papers, are to be treated as if contained in a separate affidavit. *Newman v. West*, 101 App. Div. 288, 91 N. Y. Supp. 740.

**538** n. 22. Where not amended, affidavit is a nullity. *Frees v. Blyth*, 99 App. Div. 541, 91 N. Y. Supp. 103.

**538** n. 23. See *Kleye v. City of Oswego*, 109 App. Div. 330, 95 N. Y. Supp. 879.

**538** n. 25. Supporting affidavits and other evidence cannot be submitted to show the authority of the notary and sustain the order. *Maniscalco v. Slamowitz*, 123 App. Div. 690, 108 N. Y. Supp. 65; *Robinson v. Cooper*, 62 Misc. 517, 115 N. Y. Supp. 599.

**539**. An affidavit purporting to be by plaintiff but in fact signed by another is a nullity. *Maniscalco v. Slamowitz*, 123 App. Div. 690, 108 N. Y. Supp. 65.

**541** § 530. Personal knowledge of the affiant will not be presumed from a mere positive averment of the facts.



Ottley v. Jackson Memorial A. M. E. Zion Church, 157 App. Div. 222, 141 N. Y. Supp. 816.

**542.** Where the complaint is one of the moving papers, a verification on information and belief, without stating the sources thereof, is of no effect. Fox v. Peacock, 97 App. Div. 500, 90 N. Y. Supp. 954.

**542 n. 43.** Eichner v. Metropolitan St. R. Co., 114 App. Div. 247, 99 N. Y. Supp. 870.

**542 n. 44.** Agnew v. Latham, 54 Misc. 61, 105 N. Y. Supp. 366.

**546 § 531.** If attorney knows the facts best, he may verify affidavit instead of party. Topia Mining Co. v. Warfield, 148 App. Div. 139, 132 N. Y. Supp. 1051. And of course if the facts are peculiarly within the knowledge of the attorney, he should make the affidavit, rather than the client. Kent v. Ætna Ins. Co., 88 App. Div. 518, 85 N. Y. Supp. 164.

**546 n. 66.** A. & S. Henry & Co. v. Talcott, 89 App. Div. 76, 85 N. Y. Supp. 98; Treadwell v. Clark, 45 Misc. 268, 92 N. Y. Supp. 166; Lederer v. Adler, 51 Misc. 572, 101 N. Y. Supp. 53. It is no excuse that the client is a non-resident. Fox v. Peacock, 97 App. Div. 500, 90 N. Y. Supp. 137.

**546 n. 69.** Terry v. Green, 53 Misc. 10, 103 N. Y. Supp. 1014.

**548 § 532.** Laws 1909, c. 65, adds the following Code provision:

“§ 2481 subd. 12. A surrogate or a clerk of the surrogate's court has power to administer oaths, to take affidavits and the proof and acknowledgment of deeds and all other instruments in writing, and certify the same with the same force and effect as if taken and certified by a county judge.”

To the list of persons who may take there is added, by amendment of this Code provision in 1911, “a city magistrate of any of the cities of this state, or police justice thereof.”

**548** n. 84. Such an affidavit is irregular but not a nullity. *De Graff v. De Graff*, 128 N. Y. Supp. 672. An affidavit taken before an attorney of record in the action is not "void." *Baumeister v. Demuth*, 84 App. Div. 394, 398, 82 N. Y. Supp. 831; *Zichermann v. Wohlstadter*, 60 Misc. 362, 113 N. Y. Supp. 403. "Although the practice forbids an attorney of record in the action to take affidavits for use therein, the affidavit, when so taken, is not void." *De Graff v. De Graff*, 128 N. Y. Supp. 672, 673. "There is no provision of the Code or statute, and no court rule, forbidding an attorney of record from taking an affidavit used in the case. The rule forbidding the same was merely a rule of practice formerly existing in the Court of King's Bench, followed and adopted by the courts of this state. The fact that an affidavit upon which a warrant of attachment was issued was sworn to before a notary public, who was the plaintiff's attorney of record, is a mere irregularity, and no ground for vacating the attachment, and a subsequent judgment, where the facts stated in the affidavit are not controverted." *Vreeland v. Pennsylvania Tanning Co.*, 130 App. Div. 405, 114 N. Y. Supp. 1102.

**549** § 533. Under Rule 37 of the General Rules of Practice, as amended in 1910, a motion cannot be denied upon opposing affidavits filed but not served within the five days. *Pociunas v. American Sugar Refining Co.*, 130 N. Y. Supp. 162. See also post, **584** § 576.

**550** § 534. While affidavits may be withdrawn and new ones substituted, there is no authority in the court to amend an affidavit. *McNamara v. Wallace*, 97 App. Div. 73, 76, 89 N. Y. Supp. 591.

**551** n. 102. *Matter of Owsley*, 153 App. Div. 90, 137 N. Y. Supp. 1040.

**552** n. 104. An affidavit taken in another state by a notary is not sufficient as a basis for an order of arrest where the official character of the notary and the genuineness of

his signature are not certified to. *Marks v. Goetchius*, 60 Misc. 143, 112 N. Y. Supp. 1009. A petition is insufficient as the basis of an order where the genuineness of the signature of the notary is not verified. *Miller v. Nevins*, 115 App. Div. 139, 100 N. Y. Supp. 703.

**552** n. 106. The case of *Turtle v. Turtle*, 31 App. Div. 49, is no longer the law since the amendment of Laws 1896 by Laws 1903, c. 419, p. 978. *Isman v. Wayburn*, 54 Misc. 86, 104 N. Y. Supp. 491.

**553** n. 109. Subdivision 5 of § 249 of c. 547 of the real property act is amended by Laws 1908, c. 61, by inserting after the words "any officer of the state" the clause "or territory in which the acknowledgment is taken." Subdivision 6 is added by Laws 1908, c. 61, which reads as follows: "6. Any officer of the District of Columbia authorized by the laws of the United States to take acknowledgment or proof of deeds to be recorded in said district."

**554** n. 110. Subdivision 5 of § 250 of the Real Property Act is amended by Laws 1908, c. 61, by adding after the words "before any officer," the words "of a province or territory" and after the words "of such dominion authorized by the laws" the words "of such province or dominion."

**555** n. 112. The real property law is amended by Laws 1906, c. 398, so as to permit the acknowledgment to be also taken before a clerk of a court of record.

**556** § 541. Subdivision 3, § 260, of the real property law in relation to the authentication of certificates of acknowledgment or proof, is amended by Laws 1908, c. 136, as follows, the amendments being enclosed in brackets: "3. Where made by an officer of the United States or [of any province or territory] of the Dominion of Canada \* \* \* by the secretary of state of the state, [the provincial secretary, deputy provincial secretary or assistant provincial secretary of the province, or commissioner of the territory of the Dominion of Canada,] or the clerk, register, recorder

or prothonotary of the county, [city or parish] in which the officer making the original certificate resided, when the certificate was made, [or in which such acknowledgment or proof was taken,] or by the clerk of any court in or of that county, city or parish, having by law a seal. [The word county shall be deemed to apply to and include the District of Columbia for the purpose of this section.]

**559 n. 131.** *Lawton v. Kiel*, 50 Barb. 30, which does not agree with the proposition stated in the text is followed in *Rosenblatt v. Jersey Novelty Co.*, 45 Misc. 59, 90 N. Y. Supp. 816, which holds that the certificates to authenticate the notary's signature, though omitted altogether, may be supplied to perfect moving papers.

**559 § 542.** Ordinarily not evidence. *Parke, Davis & Co. v. Rouden*, 117 N. Y. Supp. 945.

**560 § 545.** Formal affidavits of merits are now dispensed with by the 1910 amendment to Rule 23 of the General Rules of Practice which as now amended reads as follows: "All motions for relief to which a party is not entitled as matter of right shall be made upon papers showing merits, and the good faith of the prosecution or defense, which may be shown by any proof that shall satisfy the court."

**560 n. 138.** This rule was repealed in 1910 by the General Rules of Practice.

**560 n. 141.** For change of law, see post, **939 n. 22.**

**561 § 547.** Affidavits held sufficient, see *Hurn v. Olmstead*, 55 Misc. 504, 105 N. Y. Supp. 1091.

**562.** An affidavit that "deponent has fully and fairly stated his defense to said action and all the facts relative thereto to his counsel is sufficient." "Thereto" refers to "action," and "action" is synonymous to "case," so that the clause should be construed to read, "and all the facts relative to the 'action'—i. e., 'case.'" *Larocque v. Conhaim*, 45 Misc. 234, 92 N. Y. Supp. 99.

**564 § 550.** Must be unequivocal and present act by which

affiant consciously takes upon himself the obligation of an oath. *Bookman v. New York*, 200 N. Y. 53, 93 N. E. 190 [aff. 133 App. Div. 242]. Necessity for raising hand, see *Bookman v. New York*, 200 N. Y. 53, 93 N. E. 190 [aff. 133 App. Div. 242].

565. Code, § 851, is now Cons. Laws, c. 40, § 1622. Effect of failure to administer oath to witness in special proceeding, see *People ex rel. Niebuhr v. McAdoo*, 184 N. Y. 304, 77 N. E. 260.

## CHAPTER II

### MOTIONS

569 § 552. Where the existence or validity of a stipulation made by parties to an action does not depend upon voluminous and disputed evidence, the court has power, on a motion therefor, to enforce it by order. *Potter v. Rossiter*, 109 App. Div. 737, 96 N. Y. Supp. 177.

569 n. 7. A motion was made by defendant's attorney for an order declaring that plaintiff's attorney of record "has ceased to be the attorney for the plaintiff in this action and no longer represents the plaintiff in any manner in this action, and that henceforth, and until due substitution of another attorney for the plaintiff herein in place of the said \* \* \* , and due notice thereof to the defendant's attorney, all notices and all papers in this action hereafter to be given or served" on the part of the defendant to or upon the plaintiff may be given and served in the same manner as if the plaintiff had not commenced this action by said attorney, and "directing that the defendant may serve a notice of motion to make the complaint herein more definite and certain, and likewise in the same manner any and all other notices and papers whatsoever in this action, and that such service hereafter made shall be valid and effectual, as if the plaintiff had not commenced this action by said

attorney or appeared therein by him." It was denied on the ground that the court will not give advance instruction to parties. *Milovich v. American Servian Society*, 61 Misc. 399, 115 N. Y. Supp. 851.

**570 n. 10.** In *Lee v. Winans*, 99 App. Div. 297, 90 N. Y. Supp. 960, it was held improper to grant a motion on affidavit where the Code required a petition.

**570 n. 11.** By amendment of section 768 of the Code in 1911 the distinction, if any, between proceeding by petition and by motion, is abolished, by adding the following new provision: "Any proceeding which is required by statute to be instituted by petition may also be instituted by an affidavit setting forth the matter which it is required that the petition shall contain, accompanying a notice of an application for the relief which would properly be prayed for in the petition; and in like manner a proceeding which is required by statute to be instituted by affidavit may be instituted by petition."

**572 § 557.** Stenographer's minutes not served as part of the motion papers should not be considered. *Crowley v. La Brake*, 147 App. Div. 389, 132 N. Y. Supp. 155.

**575 n. 43.** *Matter of National Gramophone Corp. Directors*, 82 App. Div. 593, 81 N. Y. Supp. 853; *Terry v. Green*, 53 Misc. 10, 103 N. Y. Supp. 1014.

**575 § 561.** For material changes by 1910 amendment of the General Rules of Practice, see post, **584 § 576.**

**576 n. 50.** See also post, **588 n. 138.** The rule is changed by the amendment of section 768 of the Code in 1911 by adding this provision: "The party making a motion may, in the notice thereof, specify one or more kinds of relief in the alternative or otherwise, and the adverse party must, where at least eight days' notice of the motion shall be given, at least one day prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party copies of the affidavits and papers which he expects to read

in opposition to the motion." It will be noticed that this provision is mandatory as to service of opposing papers.

576 n. 51. Facts alleged in the moving affidavits cannot be considered contradicted by statements of conclusions in counter-affidavits. *Boyle v. Standard Oil Co.*, 102 App. Div. 622, 92 N. Y. Supp. 677.

576 § 562. While it is the better practice to submit all affidavits to the opposing attorney in advance of the argument, rule 21 of the General Rules of Practice does not so require in the second department. *Wanser v. De Nyse*, 116 App. Div. 796, 102 N. Y. Supp. 36. And even under rule 37 of the General Rules of Practice, as amended, the court has power to permit answering affidavits, in a proper case, even though not served within the time limited by the moving party in his notice of motion. *McMasters v. Allcutt*, 151 App. Div. 559, 136 N. Y. Supp. 144.

577 n. 60. *Chapins v. Long*, 77 App. Div. 272, 274, 78 N. Y. Supp. 1046. That defendant, after service of papers on a motion to require plaintiff to pay the costs of a former action against another defendant, procured an assignment of the judgment for such costs from the judgment creditor, is not ground for granting the motion. *Tanzsheim v. Brooklyn, Q. C. & S. R. Co.*, 106 App. Div. 233, 94 N. Y. Supp. 534. If new facts are discovered after the motion is made, the court may, in its discretion, postpone the hearing and allow others to be served. *Northrup v. Village of Sidney*, 97 App. Div. 271, 274, 90 N. Y. Supp. 23.

578 § 564. Order proper where depositions of witnesses are necessary to oppose a motion to vacate a supplemental summons. *Johnson v. Wellington Copper Mining Co.*, 58 Misc. 353, 110 N. Y. Supp. 1098. The motion will not be granted where the order would be useless because the persons sought to be examined will not swear to the facts which the party seeks to establish. *Davis v. Rosenzweig Realty Operating Co.*, 53 Misc. 1, 102 N. Y. Supp. 868.

**578 n. 70.** This Code provision applies equally well to motions after judgment, such as a motion for a new trial. *O'Connor v. McLaughlin*, 80 App. Div. 305, 80 N. Y. Supp. 741. Excepted courts are now within rule by Laws 1909, c. 65, amending Code provision.

**578 n. 73.** See also *People ex rel. Tuell v. Paine*, 92 App. Div. 303, 86 N. Y. Supp. 1109, where the motion was denied in contempt proceedings because the testimony could be taken directly in the contempt proceeding. "It must be made to appear, first, that the person sought to be examined can, and, if compelled, will, swear to the facts desired; and, secondly, that the facts to which he can swear are relevant to the motion. The proceeding is not intended to be used as one for the general examination of witnesses, and no good purpose is to be served by putting questions which will elicit denials of the facts sought to be established." If it is shown that the parties will not swear to the facts which the moving party seeks to establish by their depositions, because they claim that such facts do not exist, the motion should be refused. *Calvert-Rogniat v. Mercantile Trust Co.*, 46 Misc. 20, 93 N. Y. Supp. 241.

**579 n. 75.** See also *Davis v. Rosenzweig Realty Co.*, 53 Misc. 1, 102 N. Y. Supp. 868.

**582 n. 91.** *Bankers' Money Order Ass'n v. Nachod*, 120 App. Div. 732, 105 N. Y. Supp. 773.

**583.** Rule 37 of the General Rules of Practice which provides that "all motions made at special or trial terms shall be brought before the court on notice," followed in *Delahunty v. Canfield*, 106 App. Div. 386, 94 N. Y. Supp. 815.

**584 § 576.** Rule 37 of the General Rules of Practice was amended in 1910 by adding the following provision: "If a notice of motion is served ten days before the return day thereof, it may, immediately after the prayer for relief and before the signature, contain the following statement: 'Answering affidavits must be served five days before the return



day,' in which case answering affidavits, in order to be used upon the motion, must be so served. The moving party, upon receiving such answering affidavits, may serve affidavits in reply at least two days before the hearing. Such replying affidavits shall be limited strictly to matters in reply. Affidavits in answer and reply cannot be read upon the motion if not so served, unless the court in its discretion, for good cause shown, may otherwise order."

585 n. 115. *Lewis v. Beach*, 112 N. Y. Supp. 200; *Van Wickle v. Weaver Coal & Coke Co.*, 88 App. Div. 603, 85 N. Y. Supp. 82; *Rallings v. McDonald*, 76 App. Div. 116, 78 N. Y. Supp. 1040. Want of jurisdiction is not an irregularity which must be specified in the notice of motion. *Armstrong v. Loveland*, 99 App. Div. 28, 90 N. Y. Supp. 711. The rule does not apply where the order is based on the merits. *Norden v. Duke*, 106 App. Div. 514, 94 N. Y. Supp. 878.

585 n. 118. *Agnew v. Latham*, 54 Misc. 61, 105 N. Y. Supp. 366.

586 n. 119. This procedure is now expressly authorized by the amendment to section 768 of the Code in 1911 by providing that the notice of motion may "specify one or more kinds of relief in the alternative or otherwise," and the same rule is made applicable to a counter notice by the opposing party. Under this amendment, motion for judgment on the pleadings may as alternative relief ask for an order vacating an order for examination before trial. *Chapman v. Read*, 149 App. Div. 52, 133 N. Y. Supp. 625. "It appears that by the recent change of section 768 of the Code, which has been amended in several respects, and one more in particular, that upon a motion the relief prayed for may be 'one or more kinds of relief in the alternative or otherwise.' This language, of course, may be presumed to refer to a situation where upon the same state of facts a person seeks two kinds of relief, such as a motion for judgment upon the plead-

ings, or, in the alternative, for leave to serve an amended pleading de novo upon terms. Such, I believe, was the intent of the Legislature under the said section, as amended, and not motions based upon entirely different papers and upon matters wholly disconnected." *Chapman v. Read & Co.*, 73 Misc. 401, 402, 133 N. Y. Supp. 281. Purpose of 1911 amendment is to minimize practice motions and save both time and expense. *Chapman v. Read*, 149 App. Div. 52, 133 N. Y. Supp. 625. Matters wholly disconnected and based on different papers should not be united. *Chapman v. Read & Co.*, 73 Misc. 401, 133 N. Y. Supp. 281.

**587 § 577.** Service of notice of motion may be made on a director of a foreign corporation in this state. *Chambers v. Bacon*, 153 App. Div. 194, 138 N. Y. Supp. 337.

**588 n. 138.** The following provision was added to section 768 of the Code in 1911: The party opposing a motion "may, at least three days prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party a notice, with or without affidavits or other papers in support thereof, specifying any kind or kinds of relief in the alternative or otherwise to which he claims to be entitled in the action whether the relief so asked for be responsive or not to the relief asked for by the moving party." It is to be noticed that this provision is not mandatory but merely permissive.

**590 § 584.** An order to show cause cannot be made in a proceeding not yet pending and over which the court has not acquired jurisdiction. *Matter of Quick*, 92 App. Div. 131, 87 N. Y. Supp. 316.

**590 n. 146.** Four-day rule is mandatory. *Feist v. Weingarten Bros.*, 111 N. Y. Supp. 848.

**590 n. 149.** See *Matter of Ehret*, 70 Misc. 576, 127 N. Y. Supp. 934.

**591 n. 155.** *Halfmoon Bridge Co. v. Canal Board*, 156 App. Div. 880, 140 N. Y. Supp. 1122; *Schiller v. Weinstein*,

45 Misc. 591, 91 N. Y. Supp. 76; *Stryker v. Churchill*, 39 Misc. 578, 80 N. Y. Supp. 588; *Sanger v. Connor*, 95 App. Div. 521, 88 N. Y. Supp. 1054; *Cole v. Smith*, 84 App. Div. 500, 82 N. Y. Supp. 982. The objection cannot, however, be first urged on appeal. *Austrian B. F. Co. v. Wright*, 43 Misc. 616, 88 N. Y. Supp. 142. The omission is ground for denying the order sought, where raised on the return of the order to show cause and before the hearing. *Sanger v. Connor*, 95 App. Div. 521, 88 N. Y. Supp. 1054. However, it is no objection to a motion made on behalf of the defendant upon the return of an order requiring the plaintiff to show cause why an order should not be made determining and declaring that the defendant is not in default for failure to appear and answer herein, or, should it be determined that defendant is in default, then opening such default and allowing the defendant to serve an amended answer that "the affidavit upon which the order to show cause was granted does not state the time appointed for holding the next trial term in this county," since the very purpose of the motion is to determine whether the action is at issue. *Sweeney v. O'Dwyer*, 45 Misc. 43, 90 N. Y. Supp. 806.

592 n. 159. *Matter of Geneva Basket Co.*, 71 Misc. 156, 127 N. Y. Supp. 943.

594 n. 175. An order to show cause why one should not be punished for contempt must be served personally. *Weeks v. Coe*, 111 App. Div. 337, 97 N. Y. Supp. 704.

594 n. 176. An order to show cause in a contempt proceeding may be served upon an attorney in the action. *Lederer v. Lederer*, 47 Misc. 471, 95 N. Y. Supp. 934.

595 n. 181. See *People ex rel. Town of Brighton v. Williams*, 145 App. Div. 8, 129 N. Y. Supp. 457.

596 n. 186. *Delahunty v. Canfield*, 106 App. Div. 386, 94 N. Y. Supp. 815.

597 n. 193. *People v. Anglo-American Savings & Loan Ass'n*, 115 App. Div. 692, 101 N. Y. Supp. 270.

**597 n. 194.** *People v. Anglo-American Savings & Loan Ass'n*, 115 App. Div. 692, 101 N. Y. Supp. 270.

**599 § 595.** Motion to correct a judgment entered by the county clerk on an order of the Appellate Division is properly made at Special Term. *Bulkley v. Whiting Mfg. Co.*, 136 App. Div. 479, 121 N. Y. Supp. 159.

**600.** Motion for judgment on the pleadings under § 547 of the Code should be made at a Special Term for motions instead of a Special Term for trials. *Higgins v. New York Dock Co.*, 75 Misc. 227, 132 N. Y. Supp. 590.

**601 § 596.** By amendment of section 768 of the Code in 1911 (c. 763) is added the following provision: "Except in the first judicial department an order which is authorized by statute to be made at chambers may be made by the court."

**602 n. 222.** This Code provision was amended in 1911 (c. 763) by excepting from the operation of this provision a motion for an extension of time on two days' notice under rule 24 of the General Rules of Practice, and cases "where it is otherwise authorized by law."

**605 n. 243.** In *re Schlotterer*, 105 App. Div. 115, 93 N. Y. Supp. 895. The Special Term of the Supreme Court cannot modify an order made by a justice of the Supreme Court, out of court, in an action pending in the County Court. *Edwards v. Shreve*, 83 App. Div. 165, 82 N. Y. Supp. 514; *Matter of White*, 101 App. Div. 172, 91 N. Y. Supp. 513.

**605 n. 246.** *Sloan v. Beard*, 125 App. Div. 625, 110 N. Y. Supp. 1. Where motion for continuance is denied and default suffered, motion to open default cannot be made before another judge. *Warth v. Moore Blind Stitcher & Overseamer Co.*, 125 App. Div. 211, 109 N. Y. Supp. 116. Cannot, even indirectly, renew without leave before one justice a motion denied by another. *American Hosiery Co. v. Himler*, 78 Misc. 32, 137 N. Y. Supp. 702. Justice at

Special Term for hearing of motions cannot review acts of another judge at a Special Term for trials. *Norwegian Lutheran, etc., Church v. Krelsovitch*, 147 App. Div. 108, 131 N. Y. Supp. 845.

**605** n. 248. *Silver & Co. v. Waterman*, 127 App. Div. 339, 111 N. Y. Supp. 546; *McGorie v. McAdoo*, 49 Misc. 601, 99 N. Y. Supp. 1107 (holding, however, that where the action has been removed to another county, and the time to appeal has expired, the motion may be made in the latter county).

**609** § 605. The motion cannot be determined on facts occurring after the motion papers are served. *Tanzsheim v. Brooklyn, Q. C. & S. R. Co.*, 106 App. Div. 233, 94 N. Y. Supp. 534. Section 768 of the Code was amended in 1911 by adding the following provision: "The pleadings in an action shall at all times when a motion is made therein be deemed to be before the court although not specifically referred to in the notice of motion."

**611** § 608. Section 768 of the Code was amended in 1911 by adding the following provision: "Upon the hearing of a motion relief shall not be denied to any party because of defects or insufficiencies in the moving papers which can be cured upon the hearing or before the entry of the order thereon, but the court or judge shall direct that such defects or insufficiencies be cured or supplied forthwith, and shall proceed to hear and consider the motion, or may direct the motion to stand over to be heard at a subsequent time or place. In either case it may award against the party in whose moving papers or application such defect or insufficiency appears, costs in favor of the adverse party." However, this amendment that relief shall not be denied because of defects in the moving papers, does not authorize the court, on a motion to change the place of trial, to allow defendant to amend his answer. *Kelley v. Ward*, 149 App. Div. 443, 134 N. Y. Supp. 451.

612 n. 286. See also *Jones v. Burgess*, 109 App. Div. 888, 96 N. Y. Supp. 873.

612 § 610. May grant relief moving party is entitled to although motion improperly combines different matters based on different papers. *Chapman v. Read & Co.*, 73 Misc. 401, 133 N. Y. Supp. 281.

612 n. 288. *Schwehm v. Hinberg*, 63 Misc. 525, 117 N. Y. Supp. 321.

612 n. 293. *Weeks v. Coe*, 111 App. Div. 337, 97 N. Y. Supp. 704; *Jones v. Burgess*, 109 App. Div. 888, 96 N. Y. Supp. 873; *Schiller v. Weinstein*, 45 Misc. 591, 91 N. Y. Supp. 76.

613 n. 297. *Matter of Radam Microbe Killer Co.*, 114 App. Div. 199, 99 N. Y. Supp. 925.

613 n. 298. *Headdings v. Gavette*, 86 App. Div. 592, 83 N. Y. Supp. 1017. But if unlawful relief is sought, it will not be granted even though there is no opposition. It follows that the failure of the opposing party to appear on the return day does not waive his right to move, on excusing his default, to amend the order by striking out a provision improperly inserted. *People ex rel. N. Y. Realty Corp. v. Miller*, 92 App. Div. 116, 87 N. Y. Supp. 341. Court may refuse to vacate order because opposing party happened to be late at calendar call, and may refuse to resettle order to show default. *Smith v. Smith*, 76 Misc. 254, 134 N. Y. Supp. 901.

614 n. 302. But see *Levine v. Munchik*, 51 Misc. 556, 101 N. Y. Supp. 14 (holding that the court should dismiss instead of denying the motion).

## CHAPTER III

## ORDERS

**616** n. 1. Indorsement on order as order, see *McAlpin v. Stoddard*, 54 Misc. 647, 105 N. Y. Supp. 9. Indorsement on order of default and dismissal held an order. *Consolidated Agency Co. v. Townsley*, 72 Misc. 155, 129 N. Y. Supp. 773.

**617** n. 3. An order relating to costs must be in writing to be reviewable as an order on appeal. *Cornwell v. Sheldon*, 134 App. Div. 58, 118 N. Y. Supp. 707.

**617** n. 4. *Loper v. Wading River Realty Co.*, 143 App. Div. 167, 127 N. Y. Supp. 1900.

**617** n. 9. See *Saal v. South Brooklyn R. Co.*, 122 App. Div. 364, 106 N. Y. Supp. 996.

**619** § 615. As to signature, see also post, **623**, n. 45. A very important amendment, intended to simplify the practice, was introduced by an amendment to section 767 of the Code in 1911 (c. 368) which provides as follows: "In determining a motion, the court shall cause its determination, together with a recital of the papers read on the motion on either side to be indorsed on or appended to the back of the motion papers and shall sign the same and such indorsement and signature shall constitute the order of the court; but nothing herein contained shall prevent the court, upon the application of either party, from resettling such order in the form of the written order heretofore in use." This section was further amended in 1912 (c. 66) by adding the following clause: "Upon such resettlement of the order, where the right to appeal depends upon whether or not such order was made in the exercise of discretion, or whether or not the decision upon which it is based involves a question of law, such order shall so state the ground upon which it was made."

Both these amendments are highly commendable, and are steps in the right direction to simplify and clarify the procedure. Under the second amendment, if a party desires to have an order reviewed on appeal without taking the risk that the court may refuse to review it on the ground that it is a discretionary order, and no discretion was in fact involved, he may have that fact appear by obtaining a resettlement of the order. On the other hand, if the successful party desires to preclude a review of an order on the ground that its granting was an exercise of discretion, and that is the fact, he may do so by himself obtaining a resettlement of the order.

**619 n. 19.** *Matter of Munson*, 95 App. Div. 23, 88 N. Y. Supp. 509. See also *Edwards v. Shreve*, 83 App. Div. 165, 82 N. Y. Supp. 514.

**619 n. 22.** *Goldreyer v. Shatz*, 114 N. Y. Supp. 339; *Lawson v. Speer*, 91 App. Div. 411, 86 N. Y. Supp. 915. That caption of order is that of a judge's order instead of a court order is not fatal, see *Lawson v. Speer*, 91 App. Div. 411, 86 N. Y. Supp. 915.

**620 § 616.** Effect of Code amendments, see ante, **619 § 615**. If an order grants less than is asked for, it should not recite that it was made "upon motion" of the moving party. *Davis v. Fogarty*, 134 App. Div. 500, 120 N. Y. Supp. 39. Recital that order was entered on motion of defendant's attorneys does not preclude them from attacking it where it appears they were not satisfied therewith. *Oppenheimer v. Carabaya Rubber & N. Co.*, 145 App. Div. 830, 835, 130 N. Y. Supp. 587, 590. An order not showing on whose motion it was made should be resettled on motion of the moving party. *Dew-Snap v. Matthews*, 118 App. Div. 789, 103 N. Y. Supp. 902.

**620 n. 28.** *Duclos v. Kelley*, 122 App. Div. 361, 106 N. Y. Supp. 1085. Judgment rolls referred to on the argument of a motion as material may be inserted in the order



where in the custody of the court when the motion was made. *Conlon v. Kelly*, 126 App. Div. 624, 100 N. Y. Supp. 1070. If the order does not specify all the motion papers, relief will be granted on a motion for a resettlement of the order. *Davis v. Reflex Camera Co.*, 99 App. Div. 567, 90 N. Y. Supp. 877.

**621 n. 33.** Papers merely referred to in opposing affidavits should not be recited. *Driscoll v. Parker Pen Co.*, 141 N. Y. Supp. 251.

**623 n. 45.** The last sentence of this paragraph was modified in 1910 so as to read as follows: "The clerk shall not enter such order unless the motion papers are filed, and unless the order is signed by the justice presiding at the court at which the motion was heard."

**624.** Formal entry of order by consent changing place of trial, other than by direction in the minutes, is not necessary. *Loper v. Wading River Realty Co.*, 143 App. Div. 167, 127 N. Y. Supp. 1000.

**624 n. 49.** *Orlando v. Palladino*, 61 Misc. 103, 112 N. Y. Supp. 1118.

**624 n. 52.** *McAlpin v. Stoddard*, 54 Misc. 647, 105 N. Y. Supp. 9.

**626 n. 64.** *McAlpin v. Stoddard*, 54 Misc. 647, 105 N. Y. Supp. 9.

**627.** Service is necessary to stay proceedings where costs are not paid. *Sire v. Shubert*, 93 App. Div. 324, 87 N. Y. Supp. 891.

**627 n. 70.** But where an order is made in a special proceeding, against a witness not a party, it seems that personal service is necessary. *Matter of Depue*, 185 N. Y. 60, 77 N. E. 798.

**628 § 620.** Irregularities in an order are waived by failure to move to modify the order. *Landmesser v. Hayward*, 157 App. Div. 74, 141 N. Y. Supp. 730. Failure to move to vacate or modify an *ex parte* order waives violations of rules

of practice. *Landmesser v. Hayward*, 157 App. Div. 74, 141 N. Y. Supp. 730.

629 § 622. Striking out pleading to enforce order, see *Williams v. Zingsem*, 157 App. Div. 899, 142 N. Y. Supp. 1150.

630 n. 96. *Landmesser v. Hayward*, 157 App. Div. 74, 141 N. Y. Supp. 730.

631 § 625. Destruction of order by judge is not equivalent to vacating it. *Hill v. Muller*, 57 Misc. 437, 107 N. Y. Supp. 1.

632 § 627. Resettled order takes place of original order. *Feist v. Weingarten Bros.*, 111 N. Y. Supp. 848. Resettlement wipes out order resettled so as to supersede an appeal therefrom. *Young v. White*, 158 App. Div. 763, 143 N. Y. Supp. 934. Motion for resettlement by party served is not precluded by service of a copy of an order entered without notice of settlement. *Hays v. Borden*, 119 N. Y. Supp. 156. Appellate Division cannot resettle an order on appeal, where the resettlement is sought on evidence not in the record. *Werner v. Werner*, 155 App. Div. 928, 140 N. Y. Supp. 1105. Order should be resettled, on motion, so as to make it contain preliminary objections to sufficiency of moving papers. *Societe Anonyme D. G. N. Belges v. Kahn*, 126 App. Div. 834, 110 N. Y. Supp. 980. A litigant cannot be deprived of his right of appeal by the arbitrary refusal of the court to resettle its order so as to show the fact that it was not made upon default or by consent. *Wollowitz v. New York City R. Co.*, 116 App. Div. 361, 101 N. Y. Supp. 830. Where an order granted on the motion of a defendant compelling a codefendant to accept service of his answer imposes costs on the moving party and recites that it was made on the motion of said defendant but in fact the order entered was presented by the codefendant against whom the motion was made, the former is entitled to a resettlement by striking out such recital, so as to entitle him to appeal.

Raymond v. Tiffany, 115 App. Div. 350, 100 N. Y. Supp. 807.

**633** n. 108. And see Feist v. Weingarten Bros., 111 N. Y. Supp. 848.

**633** § 628. Jurisdiction cannot be conferred by a nunc pro tunc order. Fink v. Wallach, 47 Misc. 247, 95 N. Y. Supp. 872.

**633** n. 111. Mistake as to names, Sporza v. German Savings Bank, 119 App. Div. 172, 104 N. Y. Supp. 260.

**634** n. 118. If the intent and spirit of a statute are carried out, the words or method used, so long as not in direct contravention of statute or rule of law or public policy, make but slight difference, and mistakes therein may be corrected nunc pro tunc. Ames v. Danzilo, 158 App. Div. 232, 143 N. Y. Supp. 75. "An order may not be made nunc pro tunc which will supply a jurisdictional defect by requiring something to be done which has not been done; but where the thing itself has been done, when the object looked at by the Code in requiring it to be done has actually been accomplished, the power to make the order express the act does exist." Mishkind-Feinberg Realty Co. v. Sidorsky, 111 App. Div. 578, 98 N. Y. Supp. 496. On an application to set aside an order because made ex parte, the court has no power to nunc pro tunc confirm the order which is irregular because ex parte. Luckey v. Mockridge, 112 App. Div. 199, 98 N. Y. Supp. 335.

**636** § 632. In line with recent attempts to avoid reversals for technical errors, section 768 of the Code was amended in 1911 by adding the following provision: "Whenever a motion is made to set aside or vacate an order, judgment or decree or any paper filed or proceeding taken, because of technical defects therein, or because of defects or insufficiencies in the papers or proceedings upon which it was made or entered and such defects or insufficiencies can, without prejudice to intervening rights, be cured or supplied, it shall be

the duty of the court to direct upon the hearing of such motion, that such defects or insufficiencies in the order, judgment or decree, or in the papers or proceedings, be cured or supplied nunc pro tunc, awarding against the party in whose order, judgment or decree, or in whose papers or proceedings such defects or insufficiencies appear, costs in favor of the adverse party."

**637 § 617.** By amendment of Rule 3 of the General Rules of Practice in 1910 any opinion delivered by the court must be filed with the order.

**638 n. 144.** "The court has the power to vacate and set aside an order or judgment on the application of one in whose favor such order or judgment was granted." In re Automatic Chain Co., 64 Misc. 280, 118 N. Y. Supp. 542, 545.

**639 § 635.** The rule that an ex parte order is not a bar to a formal motion upon proper notice is not affected by the fact that the court required the moving party to give informal notice of the first motion. *Grant v. Greene Consol. Copper Co.*, 118 App. Div. 853, 103 N. Y. Supp. 676. Where an improper order has been vacated and set aside, and the moving party acquiesces therein, instead of taking an idle and vexatious appeal, and presents new papers and obtains a proper order in a proceeding where he is entitled to it as matter of right, and not of favor, he is not obliged to obtain leave therefor. *Regan v. Gorham Co.*, 129 App. Div. 315, 113 N. Y. Supp. 738. When proper, on denying motion, to grant leave to renew, see *Foster v. Curtis*, 120 App. Div. 874, 105 N. Y. Supp. 362.

**639 n. 149.** *Heischober v. Polishook*, 152 App. Div. 193, 136 N. Y. Supp. 567; *Lee v. Bowling Green Savings Bank*, 55 Misc. 369, 106 N. Y. Supp. 568; *Haskell v. Moran*, 117 App. Div. 251, 103 N. Y. Supp. 667; *Garner v. Hellman*, 47 Misc. 336, 93 N. Y. Supp. 431; *Tracy v. Falvey*, 102 App. Div. 585, 92 N. Y. Supp. 625. See also *Hayward v.*

Wemple, 152 App. Div. 195, 136 N. Y. Supp. 620; Childs v. Childs, 144 App. Div. 168, 128 N. Y. Supp. 782.

**640.** A motion to vacate or reduce a judgment is not a renewal of a motion to open the default. *Sutherland v. Mead*, 80 App. Div. 103, 106, 80 N. Y. Supp. 504.

**640 n. 155.** *De Lacy v. Kelly*, 147 App. Div. 37, 131 N. Y. Supp. 702; *Haskell v. Moran*, 117 App. Div. 251, 103 N. Y. Supp. 667.

**643 n. 178.** *Klipstein & Co. v. Marchmedt* is reported in 39 Misc. 794, 81 N. Y. Supp. 317.

**644.** A party should not be permitted to renew a motion, after a considerable expenditure by the opposing party, without payment of the costs by the unsuccessful party, especially where the merits of the application were not passed on owing to deficiencies in the moving papers. *Wasserman v. Benjamin*, 91 App. Div. 547, 86 N. Y. Supp. 1022.

**644 n. 189.** *Murphy v. Kelly*, 89 App. Div. 619, 85 N. Y. Supp. 912.

**644 § 639.** A motion for a reargument should not be granted after the time to appeal has expired. *Klipstein & Co. v. Marchmedt*, 39 Misc. 794, 81 N. Y. Supp. 317.

## CHAPTER IV

### NOTICES AND PAPERS

**646 § 641.** Where a party notified neglects to appear, he is not entitled to notice of subsequent steps, unless required by statute. *Hammond v. Knox*, 125 App. Div. 9, 109 N. Y. Supp. 367.

**648 n. 12.** In a dissenting opinion, it is held that this rule as to the failure to return papers only applies to papers that can be properly served in the due course of procedure, and has no reference to an unauthorized and void notice. Hon-

singer v. Union Carriage & Gear Co., 175 N. Y. 229, 234, 67 N. E. 436.

650 § 647. Where papers are delivered to the proper officer to be filed, his failure to perform his duty does not impair the rights of the party. *Fink v. Wallach*, 109 App. Div. 718, 96 N. Y. Supp. 543. In New York county, a new system of filing papers in a case, whereby all the papers in an action bear the same number as the number given to the original process, is provided for at considerable length. The amendment, added as a new section (1245a) of the Code in 1911 (c. 200) is as follows: "Within three days after a summons, writ or other original process is served in an action in the supreme court, New York county, the attorney or party causing the same to be served shall file said process with proof of service in the office of the clerk who has custody of the records of the court in which the action is brought. The said clerk shall, upon receipt thereof, stamp the same [upon its front page] with a certain number to be one of the series for that year, and enter in the current docket book, on the half page bearing the same number, the names of the parties as they appear on said process, and the name and address of the attorney who issued the same. And the attorney or party causing such summons, writ or original process to be served shall, upon demand, give to the party so served, or to the attorney of such party, the number so stamped by the clerk, stamped or indorsed upon a paper with the title of the action, and the name and address of the attorney or party who made or caused the service to be made. All papers in the action shall bear the same number [and year] as the summonses, writ or other original process, which number shall constitute a part of the title of such action. All original papers in the action, with proof or admission of their service, not later than the day after their service, shall be filed with or mailed to the clerk who stamped the number on the summons, writ or

other original process." It is also provided that "all papers to be hereafter filed with the clerk of New York county must be flat and filed flat." The section was further amended in 1912 by adding the words in brackets. Matter relating to entries by the clerk is omitted herein. In New York county, order need not be filed but may be deposited with the special deputy county clerk assigned to Special Term. *Ehret v. Ringler Co.*, 144 App. Div. 480, 129 N. Y. Supp. 551.

651 § 648. Rule 86 of the General Rules of Practice, enacted in 1913, provides as follows in regard to publication of notices in the First Department: "Whenever a notice, summons, citation, order or other paper shall be required by the Code of Civil Procedure or other provision of law, or by the order of any court or a judge thereof, or of a surrogate or of the clerk of a court or any other official or individual, to be published in a newspaper in the First Department, or public notice of any application to a court or judge or other officer shall be required to be given by publication thereof in a newspaper in the First Department, or where any court or a judge thereof or a surrogate or other judicial officer or public officer is authorized or required to designate a newspaper in the First Department for the publication of any such notice, summons, citation, order or other paper, the newspaper designated by any court or judge thereof, or surrogate or other judicial officer or public officer, shall be a newspaper designated by the Appellate Division of the Supreme Court in the First Department as hereinafter provided, and no such publication shall be deemed to give the notice required to be given if the same is published in any newspaper in the First Department which has not been designated by an order of the Appellate Division of the Supreme Court in the First Department; and the publication of such notice, summons, citation, order or other paper in any undesignated newspaper in the First Department shall not be

deemed a compliance with any provision of the Code of Civil Procedure or other provision of law or of the order of any court or judge. The Appellate Division of the Supreme Court in the First Department shall from time to time designate such newspapers in such Department as in its opinion have such a circulation as is calculated to give public notice of a legal publication, and from time to time revoke such designation. To entitle a newspaper to such a designation, it must file with the Clerk of the Appellate Division a statement, duly verified, showing approximately the amount of its circulation, the time and place of its regular publication, and a statement of its charges for legal publications."

652 n. 35. Section 74 of the Executive Law, added by amendment in 1893, abolished the state paper and provided that notices to be published in the state paper be published in the county of the place of trial in a newspaper to be designated by the court or judge.

## CHAPTER V

### SERVICE OF PAPERS

654. Laws 1909, c. 65, adds the following Code section:

"§ 801a. **Service in certain actions when name of deceased person is stated as defendant.** In case any action or proceeding shall be brought, founded in whole or in part upon any transaction growing out of a business conducted as provided by subdivision three of section twenty and section twenty-one of the partnership law, and the name of the deceased person is stated as a defendant, the process and papers therein may be served on any person or persons using such name with like effect as though such person or persons had been named as defendant by his or their own respective names, and with the same effect as though all such persons were served with process, and the process and all papers



may be amended by substituting the name or names of the person or persons using the name of such deceased, and no action or proceeding shall fail, abate or be in any manner hindered by the name of such deceased being so used."

**654** n. 1. Statutes not applicable to service of a summons or other process. *Korn v. Lipman*, 201 N. Y. 404, 94 N. E. 861. In line two, substitute "or to a case where" in place of "except when," in conformity with the amendment by Laws 1909, n. 65. Personal service of the original process claimed to be disobeyed is necessary to bring a party into contempt. *Goldie v. Goldie*, 77 App. Div. 12, 16, 79 N. Y. Supp. 268. Section 797 has no application to service of papers upon non-residents of the state. *Gottlieb v. Kurlander*, 52 Misc. 89, 101 N. Y. Supp. 751.

**655** n. 8. *Matter of Blumberg*, 149 App. Div. 303, 307, 133 N. Y. Supp. 774, 777.

**655** n. 10. The service should be personal where the paper is to bring a party into contempt. *Goldie v. Goldie*, 77 App. Div. 12, 79 N. Y. Supp. 268.

**656** n. 16. Under § 797 of the Code, order to show cause may be served by leaving at the residence of the party to be served, about 6 P. M. with a person of suitable age and discretion. *Barrie v. Friedman*, 79 Misc. 86, 139 N. Y. Supp. 337.

**656** § 655. Notice of motion may be served in the state on a director of a foreign corporation. *Chambers v. Bacon*, 153 App. Div. 194, 138 N. Y. Supp. 137.

**657** n. 25. Laws 1909, c. 65, amends this Code provision so as to make it applicable to "a person regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, but who resides in an adjoining state."

**658** n. 37. It is not sufficient to drop in the office letter box of an attorney a paper not inclosed in a wrapper and not

directed to him. *Fitzgerald v. Dakin*, 101 App. Div. 261, 91 N. Y. Supp. 1003.

661 n. 56. The indorsement "personal delivery only" on a registered package does not affect the validity of the service. *Sears v. Tenhagen*, 50 Misc. 275, 100 N. Y. Supp. 469.

661 n. 61. Unauthorized claim by post office clerk at place of delivery that additional postage is due is immaterial. *Humphreys v. Roskam Scott Co.*, 133 N. Y. Supp. 914. Where a plea is served by mail and only part of the required postage is paid, the service is bad where the addressee refuses to accept the mail and pay the additional postage. *Kuh v. Goldman*, 119 App. Div. 148, 104 N. Y. Supp. 255.

661 n. 62. *Kuh v. Goldman*, 119 App. Div. 148, 104 N. Y. Supp. 255. But if the attorney to whom the papers are sent pays the amount of excess postage and receives the package containing the papers, he cannot return them, after inspection, as irregularly served. *Appeal Printing Co. v. Sherman*, 99 App. Div. 533, 91 N. Y. Supp. 178.

663 n. 70. This rule is repealed by the 1910 amendment, so far as double time is concerned, by substituting the provision that in such a case "three days shall be added to the time specified." This amendment does away with several troublesome questions. Prior thereto, it was held that where order putting case over the term is conditioned on payment of ten dollars costs, and it provides that if such costs are not paid in twenty days plaintiff may enter an order striking out defendant's answer, forty days is allowed to pay such costs where the order is served by mail. *Van v. Madden*, 134 App. Div. 750, 119 N. Y. Supp. 477. So it was held that if the pleading, concerning which the motion is made is served by mail, the party served has double time to make any motion relating to such pleading (*Borsuk v. Blauner*, 93 App. Div. 306, 87 N. Y. Supp. 851); that service of an answer by mail gives the plaintiff forty days, i. e., double time, to serve

an amended complaint as of course (*Bucklin v. Buffalo, A. & A. R. Co.*, 41 Misc. 557, 85 N. Y. Supp. 114); that service of a judgment or order by mail doubles the time allowed to move, under section 724 of the Code, to set aside the judgment or order because of mistake, inadvertence, etc. (*Atkinson v. Abraham*, 78 App. Div. 489, 79 N. Y. Supp. 680.) See also vol. 1, pp. 1023, 1024.

663 n. 71. *Persbacker v. Murphy*, 153 App. Div. 492, 138 N. Y. Supp. 537; *Seckel v. Tangemann*, 53 Misc. 268, 103 N. Y. Supp. 77.

663 n. 71a. *Schlesinger v. Borough Bank*, 112 App. Div. 121, 98 N. Y. Supp. 136. See *Schlegel v. Roman Catholic Church*, 194 N. Y. 391, 87 N. E. 426 [affirming 127 App. Div. 929, 111 N. Y. Supp. 1143]; *Wood v. Ordway*, 63 Misc. 181, 118 N. Y. Supp. 422.

663 n. 72. *People v. West Side B. L. C. & B. Soc.*, 51 Misc. 82, 99 N. Y. Supp. 206.

663 § 660. Papers may be served on a Hebrew on Saturday, a holy day. *New York & New Jersey Telephone Co. v. Rosenthal*, 128 App. Div. 220, 112 N. Y. Supp. 612.

664 n. 82. Penal Code provision is now Cons. Laws, c. 40, § 2148.

666 n. 102. Admission of service of pleading, by striking out the word "duly" from the written form, is not an admission of due service. *Corning Cut Glass Co. v. Irons*, 64 Misc. 469, 118 N. Y. Supp. 586. It is only where "due and proper service" is admitted that a party is deemed to have waived any defect. *Tudor v. Ebner*, 109 App. Div. 521, 96 N. Y. Supp. 392.

669 n. 113. Acceptance of an overdue answer by one attorney for a plaintiff is sufficient where coplaintiffs appear by different attorneys all of whom sign the complaint. *Muller v. Philadelphia*, 114 App. Div. 138, 99 N. Y. Supp. 618.

## CHAPTER VI

## GENERAL REGULATIONS RESPECTING BONDS AND UNDERTAKINGS

**678 § 670.** The following new section is added to the Code article relating to "general regulations respecting bonds and undertakings" by amendment in 1913: "Sec. 813-a. Further protection for undertakings in certain cases. Where an undertaking has been or shall be given in any action or proceeding the court may in its discretion, if justice so requires, order further or other security to be given in addition to such security. Upon cause shown the court may permit an examination or re-examination of any surety upon any such undertaking. Upon such examination or re-examination, if justice so requires, the court may require a new surety or sureties to be furnished or further or other security to be given in addition to the security already given. The court may enforce such order by any disposition of the action or proceeding that may be proper."

**679 n. 56.** *Amer. Exchange Bk. v. Goubert*, 135 App. Div. 371, 120 N. Y. Supp. 397.

**679 § 673.** If exception to sureties is withdrawn before the time expires for their justification, and the undertaking is approved, failure of one of the sureties to justify does not discharge him ab initio. *Seidman v. Finkelstein*, 76 Misc. 549, 135 N. Y. Supp. 648.

**680 n. 65.** *Harriman v. Geer*, 75 Misc. 218, 133 N. Y. Supp. 270.

**683 n. 90.** *Zwecker v. Levine*, 135 App. Div. 432, 120 N. Y. Supp. 425.

**684 n. 95.** The proposition that "where no adverse decision has been made, the parties to an undertaking may, in good faith, agree on a recovery which shall be binding on the surety," while supported by the case cited, is a too

broad statement of the law, at least in so far as undertakings on appeal are concerned, since *Foo Long v. American Surety Co.*, 146 N. Y. 251, 256, holds that a pro forma affirmance of a judgment on appeal based solely on the stipulation of the parties is not such an affirmance as will bind the sureties on an appeal bond.

**684** § 677. Section 812 of the Code contemplates two proceedings by a surety. The one is ex parte as to creditors, for the release of the surety from liability for the "future" acts or omissions of his principal; the other is on notice to all parties interested for release from all acts and omissions past and future. *Siebert v. Milbank*, 95 App. Div. 566, 88 N. Y. Supp. 993. Provision in § 812 of the Code refers only to the sureties of fiduciaries, and to the cancellation of undertakings as to future obligations. Does not apply to undertaking to stay execution pending appeal where the party dies pending appeal. *Allen v. National Surety Co.*, 144 App. Div. 509, 129 N. Y. Supp. 228.

**686** n. 106. Under this statute, a surety company is entitled to be released from the bond of a receiver although he has paid the company a year's premium and the year has not expired. *Matter of U. S. Fidelity & Guaranty Co.*, 50 Misc. 147, 98 N. Y. Supp. 217.

**686** n. 107. *O'Connor v. Walsh*, 83 App. Div. 179, 183, 82 N. Y. Supp. 499.

**687** n. 112. To same effect, see *In re Fenn*, 128 App. Div. 10, 112 N. Y. Supp. 431.

**687** § 680. See *Stuart v. Abbey*, 62 Misc. 84, 116 N. Y. Supp. 259. Insolvency of party does not warrant a recovery on an undertaking given to stay proceedings where it is not shown that he was solvent at the time the stay was granted. *Gibbs v. Title Guaranty & S. Co.*, 79 Misc. 247, 139 N. Y. Supp. 945.

**688** n. 122. This Code provision as to leave to sue does not apply to bonds given to discharge a mechanic's lien.

Pierce, Butler & Pierce Mfg. Co. v. Wilson, 118 App. Div. 662, 103 N. Y. Supp. 678. The obtaining of leave to sue is an essential fact which must be alleged in the complaint. Goldstein v. Michelson, 45 Misc. 601, 91 N. Y. Supp. 33.

**689.** It is no defense to an action on an undertaking conditioned to pay a judgment, if recovered, that the issuance of an execution on the judgment has been stayed pending an appeal. Isaacs v. Illinois Surety Co., 67 Misc. 603, 124 N. Y. Supp. 816.

## CHAPTER VII

### GENERAL REGULATIONS RESPECTING TIME

**692 n. 3.** Section 1778 of the Code presents an exception to this rule in that it provides that the time to answer or demur can be extended only by the court, on notice, in an action against a corporation to recover damages for the non-payment of a note, or other evidence of debt, for the absolute payment of money, on demand, or at a particular time. Sufficiency of affidavit on motion for leave to serve complaint after time expired, see Martin v. McCurdy, 120 App. Div. 665, 105 N. Y. Supp. 474.

**692 n. 6.** For change of law, see post, **939 n. 22.**

**695.** Stipulation allowing defendant "until" a certain day to answer includes that day. Sugerman v. Jacobs, 160 App. Div. 411, 145 N. Y. Supp. 429. An action is not begun "within" twenty years where the cause of action arose June 27, 1884, and the summons was delivered for service June 27, 1904, notwithstanding that June 26, 1904, came on Sunday. Vose v. Kuhn, 45 Misc. 455, 92 N. Y. Supp. 34. Sunday is to be excluded when it is the last day in a period of days and not when it is the last day in a period of years. Benoit v. New York Cent. & H. R. R. Co., 94 App. Div. 24, 28, 87 N. Y. Supp. 951.

**696 n. 21.** Sunday. Heckman v. Stein, 64 Misc. 144, N. Y. Practice—11

117 N. Y. Supp. 1026. Where notice of an injury is required to be given within one month, and the injury occurs on the tenth, the computation is from the tenth so that the notice must be served on or before the tenth of the succeeding month. *Biggs v. Geneva*, 100 App. Div. 25, 90 N. Y. Supp. 858. The provision of the Statutory Construction Law that a "Sunday or a public holiday other than a half-holiday must be excluded from the reckoning if it is the last day of any such period or if it is an intervening day of any such period of two days" is not applicable to a period of months or years. For instance, where an insurance policy provides that no action can be maintained on it unless commenced within six months after the death of the insured, and such period expires on Sunday, an action commenced on the following Monday is barred. *Ryer v. Prudential Ins. Co.*, 185 N. Y. 6, 77 N. E. 727 [reversing on this ground 110 App. Div. 897, 95 N. Y. Supp. 1158, which affirmed 85 App. Div. 7, 82 N. Y. Supp. 971].

696 n. 22. *Benoit v. New York Cent. & H. R. R. Co.*, 94 App. Div. 24, 87 N. Y. Supp. 951; *Vose v. Kuhn*, 45 Misc. 455, 92 N. Y. Supp. 34. The rule is applicable to a contract. *Ryer v. Prudential Ins. Co.*, 185 N. Y. 6, 77 N. E. 727. Sunday or public holiday not to be excluded when it is the last day of a period of years. *Hendrickson v. Callan*, 70 Misc. 342, 128 N. Y. Supp. 980.

## CHAPTER VIII

### MISTAKES, OMISSIONS, DEFECTS AND IRREGULARITIES

699 § 688. Section 724 of the Code applies only to mistake, etc., "of the party seeking relief." *Lackner v. American Clothing Co.*, 112 App. Div. 438, 98 N. Y. Supp. 376; *New York & New Jersey Telephone Co. v. Rosenthal*, 128 App. Div. 220, 112 N. Y. Supp. 612.

**705** n. 31. An affidavit and notice of claim for damages for personal injuries against a city are not proceedings in an action so as to be curable by an amendment at the trial. *Kleye v. City of Oswego*, 109 App. Div. 330, 95 N. Y. Supp. 879.

**708** nn. 49, 40. That the Appellate Division may, in certain cases, exercise its own discretion, on appeal, though no actual abuse of discretion in the court below is found, see *Lawson v. Hilton*, 89 App. Div. 303, 85 N. Y. Supp. 863.





## PART III

### COMMENCEMENT OF THE ACTION

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#### CHAPTER I

##### THE SUMMONS

**711.** The courts of New York will not order the service of summons and complaint, issuing out of a Mexican court, on a resident of New York. In *re Romers*, 56 Misc. 319, 107 N. Y. Supp. 621.

**716 n. 34.** *Matter of Korpolinski*, 84 Misc. 96. See also *Morison v. Laing*, 132 App. Div. 689, 117 N. Y. Supp. 416. Spelling is amendable when notice is sufficient to confer jurisdiction. *Hirsch v. Camman*, 56 Misc. 349, 106 N. Y. Supp. 814.

**717 n. 42.** Description of defendants as "executors of the estate of" does not require a dismissal of the complaint where they were not in terms sued as executors and the facts show individual liability. *Limbach v. Wallach*, 70 Misc. 237, 126 N. Y. Supp. 666.

**717 n. 45.** *Thomas Russell & Sons v. Stampers' & Gold Lead Local Union*, 57 Misc. 96, 107 N. Y. Supp. 303.

**717 n. 47.** See also *Goldberg v. Markswitz*, 94 App. Div. 237, 87 N. Y. Supp. 1045. Cannot include fictitious names promiscuously. *Matter of Connell*, 77 Misc. 251, 137 N. Y. Supp. 667.

**718 n. 49.** Code provision is mandatory. *Italian Importing Co. v. Spodaro*, 63 Misc. 320, 117 N. Y. Supp. 135.

**718 n. 53.** Effect of service of complaint, subsequent to service of summons, stating a different place of trial, see post, **919 nn. 6, 7.**

**720 n. 58.** A summons signed by different attorneys representing different plaintiffs is defective. *Jones v. Conlon*, 48 Misc. 172, 95 N. Y. Supp. 255.

**721 n. 65.** *Sullivan v. Harney*, 53 Misc. 249, 103 N. Y. Supp. 177.

## CHAPTER II

### PERSONAL SERVICE OF SUMMONS

**729 § 709.** See also post, **881 n. 463.**

**730 § 711.** But there is no immunity where a nonresident comes within the state under compulsion by virtue of a subpoena served on him here. *Dwelle v. Allen*, 151 App. Div. 717, 136 N. Y. Supp. 216 [foll. *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377]. Person under bail who comes into state to attend trial of an indictment against him is not exempt from service of process in a civil suit. *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 90 N. E. 962, [aff. 133 App. Div. 750].

**730 n. 18.** *Goldsmith v. Haskell*, 120 App. Div. 403, 105 N. Y. Supp. 327; *Kinsey v. American Hardwood Mfg. Co.*, 94 N. Y. Supp. 455. Where a nonresident comes into the state for the double purpose of attending court and attending to business the privilege does not attach to him. *Finucane v. Warner*, 194 N. Y. 160, 86 N. E. 1118.

**731.** Nonresident attorney coming into state to conduct litigation for his client is not privileged from service of summons. *Kutner v. Hodnett*, 59 Misc. 21, 109 N. Y. Supp. 1068.

**731 n. 26.** Public policy and comity towards the federal courts charged with the administration of the Bankruptcy Law, require that the parties litigant, as well as witnesses,

who come to participate in the bankruptcy meetings and hearings before referees, should be free from interference by service of process from the state courts. *Powell v. Pangborn*, 161 App. Div. 453.

**731** n. 27. See *Ginsburg v. Heller*, 80 Misc. 147, 140 N. Y. Supp. 1013.

**731** n. 31. *Ringler Co. v. Kraus, etc.*, 3 Current Ct. Dec. 131.

**732** n. 35. For example, see *Finucane v. Warner*, 60 Misc. 336, 112 N. Y. Supp. 137. Where service is one hour after case closes, witness is exempt. *Roberts v. Thompson*, 149 App. Div. 437, 134 N. Y. Supp. 363.

**733** n. 43. A fortiori, one voluntarily coming into the state to defend himself against a criminal charge is not exempt. *Notograph Mfg. Co. v. Scrugham*, 109 N. Y. Supp. 212.

**733** n. 47. Code provision is now Cons. Laws, c. 30, § 5.

**734** n. 55. Proof by affidavit that a warrant of attachment has been granted is necessary. *Wilson v. Lange*, 40 Misc. 676, 83 N. Y. Supp. 180.

**735** § 717. Service in a crowded depot, where reporters and others were trying to reach defendant who was handcuffed to a detective and carried a bag in the other hand, by thrusting the paper in the face of the prisoner which act was forcibly repulsed by the detective, is insufficient, where defendant did not know that he was being served and the summons fell to the floor and was not picked up. *Anderson v. Abeel*, 96 App. Div. 370, 89 N. Y. Supp. 254. The fact that the summons and complaint is found upon the floor of a house or in the street by a defendant in an action, or is delivered to a defendant in the action by one so finding it, is not the service that the Code requires, and defendant is under no obligation to appear and answer because a copy of the summons in an action in which he is named as a defendant comes incidentally into his possession, when there

is no delivery of the summons as a service upon him. Under such circumstances the defendant is justified in waiting until the judgment is sought to be enforced. The question of laches cannot be considered, as the defendant has the legal right to have the judgment set aside at any time upon it appearing that it had been entered without actual service of the summons. *O'Connell v. Gallagher*, 103 App. Div. 61, 93 N. Y. Supp. 643.

**735 n. 67.** Entry by force. *Olson v. McConihe*, 54 Misc. 48, 105 N. Y. Supp. 386. Service set aside where process server obtained entrance to defendant's bed-room by trickery. *Bell v. Lawrence*, 140 N. Y. Supp. 1106.

**738 § 720.** Service on one of three trustees does not bind all. *New York v. Dietz*, 66 Misc. 628, 123 N. Y. Supp. 1072.

**738 n. 85.** An amendment of this Code provision in 1911<sup>3</sup> (c. 279) strikes out of subdivision 1 the words "to the infant in person, and also," and adds the following: "If the defendant is an infant over the age of fourteen years, to the infant in person, and also to his father, mother or guardian; or, if there is none within the state, to the person having the care and control of him, or with whom he resides, or in whose service he is employed. Where the defendant is an infant under the age of fourteen years, the court shall, in the defendant's interest, make an order, requiring a copy of the summons to be also delivered, in behalf of the defendant, to a person designated in the order, and that service of the summons shall not be deemed complete until it is so delivered. Where the defendant is an infant over the age of fourteen years a similar order may be made by the court in its discretion, with or without application therefor."

**738 n. 86.** See also ante, **738 n. 85.**

**739 n. 89.** Service by publication, see Code Civ. Proc., § 438 (last par.) as amended in 1914, and see § 737 of this work.

**739 n. 92.** An amendment to this Code provision in 1913

(c. 279) changes the first part of the section so as to provide, "If the court has, in its opinion, reasonable ground to believe that the defendant, by reason of habitual drunkenness, or for any other cause, is mentally incapable," omitting the clause as to an infant of the age of fourteen years or over which is provided for by the amendment to § 426, subd. 1 (738 n. 85). The court may go further than merely appointing a person on whom to serve a copy of the summons, by making the provisions of the order broad enough to enable the person appointed to look after the interests of the defendant at every stage of the action. *American Mortg. Co. v. Dewey*, 106 App. Div. 389, 94 N. Y. Supp. 808.

**742.** The fact that the service of the summons and the copy served comes to the attention of the corporation served, in due time, does not validate a service on one not enumerated in the Code as a person on whom service may be made. *Eisenhofer v. New Yorker Zeitung Pub. & Print. Co.*, 91 App. Div. 94, 86 N. Y. Supp. 438; *Kramer v. Buffalo Union Furnace Co.*, 116 N. Y. Supp. 1101. A mere clerk who receives payment of a bill due the corporation is not the cashier who may be served. "The" cashier is the one who has charge of the funds of the corporation and has the right to take charge thereof to the exclusion of every person. *Id.*

**743.** Assistant superintendent held not managing agent. *Kramer v. Buffalo Union Furnace Co.*, 116 N. Y. Supp. 1101. Foreman of milk station held a managing agent. *Wesley v. Beakes Dairy Co.*, 72 Misc. 260, 131 N. Y. Supp. 212. Service on bookkeeper insufficient. *Van Damm v. New York Central Storage Co.*, 132 N. Y. Supp. 394; *Rogers v. New York Central Storage Co.*, 131 N. Y. Supp. 591.

**743 n. 123.** *Yorkville Bank v. Henry Zeltner Brewing Co.*, 80 App. Div. 578, 80 N. Y. Supp. 839. It seems, however, that if the resignation is made in bad faith to throw the

company into the hands of a receiver, and is held by the courts to be ineffective, the service is good. *Zeltner v. Henry Zeltner Brewing Co.*, 85 App. Div. 387, 83 N. Y. Supp. 366.

744 § 723. As amended by Laws 1909, c. 65, this Code provision now reads as follows: "Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows:

"1. To the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

"2. To a person designated for the purpose as provided in section sixteen of the general corporation law.

"3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the state, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the state.

"4. If the person designated as provided in section sixteen of the general corporation law dies or removes from the place where the corporation has its principal place of business within the state and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the state, process against the corporation in an action upon any liability incurred within this state or if the corporation has property within the state may after such death, removal or revocation and before another designation is made be served upon the secretary of state." Summons may be served on the president of a foreign corporation in this state where it maintains a transfer office here and its principal officers reside here. *Smith v. Western*

Pacific R. Co., 138 App. Div. 244, 122 N. Y. Supp. 888. The fact that the corporation actually received information from the agent as to the service of the summons is not sufficient, where it is not served on a proper person. *Beck v. North Packing & Prov. Co.*, 159 App. Div. 418, 144 N. Y. Supp. 602.

**744 n. 130.** Where relied on, plaintiff must show that cause of action arose within the state. *Hansen v. American Security & Trust Co.*, 159 App. Div. 101, 144 N. Y. Supp. 839. Cause of action held to have arisen within the state, within last clause. *Donohue v. City Water Power Co.*, 159 App. Div. 777, 144 N. Y. Supp. 923. Code provision is not unconstitutional as depriving party of property without due process of law. *Grant v. Cananea Consol. Copper Co.*, 189 N. Y. 241, 82 N. E. 191. Service may be made on president although the company has not designated anyone to accept service in this state. *Grant v. Cananea Consol. Copper Co.*, 189 N. Y. 241, 82 N. E. 191. This Code provision is now Cons. Laws, c. 23, § 16, and Code Civ. Proc., § 931a.

**745 n. 132.** *Sadler v. Boston & Bolivia Rubber Co.*, 140 App. Div. 367, 125 N. Y. Supp. 405. But see *Grant v. Cananea Consol. Copper Co.*, 117 App. Div. 576, 102 N. Y. Supp. 642 [reversed without deciding this question in 189 N. Y. 241], (which holds that a federal question is involved and hence the federal rule must be followed).

**745 n. 133.** *Sadler v. Boston & Bolivia Rubber Co.*, 140 App. Div. 367, 125 N. Y. Supp. 405. A different rule prevails in the federal courts in construing the New York Code provisions. *Goldey v. Morning News*, 156 U. S. 518 (followed in *Conley v. Mathieson Alkali Works*, 190 U. S. 406).

**746.** What constitutes termination of agent's authority, see *Rath v. Ohio German Fire Ins. Co.*, 132 App. Div. 672, 117 N. Y. Supp. 382.

**746 n. 138.** The service need be personal if he admits



due service. *Applebaum v. Star Fire Ins. Co.*, 115 App. Div. 117, 100 N. Y. Supp. 747. The agency to accept service, if shown, will suffice, whether the corporation is doing business within the state at the time or not. *Johnston v. Mutual Reserve Life Ins. Co.*, 45 Misc. 316, 90 N. Y. Supp. 539.

747 n. 143. This is so although the superintendent has revoked the company's right to do business in this state. *Klein Bros. & Co. v. German Union Fire Ins. Co.*, 66 Misc. 538, 123 N. Y. Supp. 1082. Service after revocation is invalid. *Badger v. Helvetia Swiss Fire Ins. Co.*, 136 App. Div. 31, 120 N. Y. Supp. 161. So long as any liabilities remain outstanding against foreign life insurance companies within the state, they cannot revoke the designation of a representative on whom service of process may be made. *Hunter v. Mutual Reserve Life Ins. Co.*, 192 N. Y. 85, 84 N. E. 576 [affirming 118 App. Div. 94, 103 N. Y. Supp. 70]. The power to accept service is not revocable so as to affect any outstanding liabilities within the state upon contracts made while the corporation was doing business; the statute of 1899 is to be read as a mere continuation of the laws in force when a contract was made, which required the designation of an agent to accept service; and this requirement is within the power of the state to impose as a condition to the permission to a foreign corporation to do business within its borders. *Woodward v. Mutual Reserve Life Ins. Co.*, 178 N. Y. 485, 71 N. E. 10; *Johnston v. Mutual Reserve Life Ins. Co.*, 45 Misc. 316, 90 N. Y. Supp. 539.

747 n. 146. *Willcox v. Philadelphia Casualty Co.*, 136 App. Div. 626, 121 N. Y. Supp. 368, 2 Civ. Pro. (N. S.) 50; *Doherty v. Evening Journal Ass'n*, 98 App. Div. 136, 90 N. Y. Supp. 671.

747, next to last sentence. It is essential that the foreign corporation should have property within this state, or that the cause of action arose here, in order to warrant service upon a cashier, director, or managing agent. Do-

herty v. Evening Journal Ass'n, 98 App. Div. 136, 90 N. Y. Supp. 671.

**748.** See *Russell v. Pittsburgh Life & Trust Co.*, 62 Misc. 403, 115 N. Y. Supp. 950 (as to service on acting cashier of life insurance company). Service on mere selling agents insufficient. *Duryee v. Sunlight Gas, etc., Co.*, 74 Misc. 440, 132 N. Y. Supp. 407. Service on mere salesman insufficient. *Meyers v. North America Watch Co.*, 149 App. Div. 215, 133 N. Y. Supp. 694. Service on managing agent of foreign railroad in hands of receivers appointed by a federal court is sufficient. *Jacobs v. Blair*, 157 App. Div. 601, 142 N. Y. Supp. 897.

**748 n. 149.** See ante, **742.**

**748 n. 150.** See *Brun v. Northwestern Realty Co.*, 52 Misc. 528, 102 N. Y. Supp. 473.

**749.** A person who collects and remits the dues of members of a fraternal insurance association is not a managing agent thereof. *Moore v. Monumental Life Ins. Co.*, 77 App. Div. 209, 78 N. Y. Supp. 1009. A representative of a foreign corporation who has no authority to accept orders, but simply obtains them and sends them to the foreign office for acceptance, and who has no discretion as to prices, and who acts in a similar capacity for various other corporations and maintains an office, the expense of which is borne in part by the corporation, is not a "managing agent." *Beck v. North Packing and Provision Co.*, 159 App. Div. 418, 144 N. Y. Supp. 602.

**749 n. 160.** *Fontana v. Post Printing & Pub. Co.*, is officially reported in 87 App. Div. 233.

**749 n. 164.** See *Rudd v. McClean Arms & Ordnance Co.*, 54 Misc. 49, 105 N. Y. Supp. 387.

## CHAPTER III

## SUBSTITUTED SERVICE OF SUMMONS

**751.** It is questionable whether substituted service is allowable in an action for a divorce. *Maiello v. Maiello*, 42 Misc. 266, 86 N. Y. Supp. 543.

**751 § 728.** Substituted service as herein provided for is equivalent to service by publication. *Bentz v. Crotona Park Realty Co.*, 81 Misc. 364, 142 N. Y. Supp. 193. "Place of sojourn" means a definite locality and not an entire country such as Canada. *Hess v. Felt*, 60 Misc. 541, 112 N. Y. Supp. 470.

**752.** In an action for a divorce, a substituted service should not be permitted, in any event, unless the moving papers show that service cannot be made by publication. *Maiello v. Maiello*, 42 Misc. 266, 86 N. Y. Supp. 543. This Code provision now applies not only to individuals but also to domestic corporations and associations where defendant cannot be found. An amendment in 1913 (c. 230) adds to the defendants included therein the clause "whether a domestic corporation, other than a municipal corporation, a joint-stock or other unincorporated association or a natural person." It also adds as to the return of the sheriff of the county where such defendant resides the words "or has its principal office or place of business." As to corporate defendants the amendatory act makes the further requirement of proof "that none of the persons mentioned in subdivision three of section four hundred and thirty-one, nor the president or treasurer of such association, can be found."

**753 n. 12.** Contra, where a single individual is in reality the corporation. *Bentz v. Crotona Park Realty Co.*, 81 Misc. 364, 142 N. Y. Supp. 193.

**753 § 729.** Failure to obtain the order within sixty days

after filing *lis pendens* is not fatal. *Hess v. Felt*, 60 Misc. 541, 112 N. Y. Supp. 470.

**753** n. 14. *Maiello v. Maiello*, 42 Misc. 266, 86 N. Y. Supp. 543. The moving papers must show that the defendant is a resident. *Lynch v. Eustis*, 85 N. Y. Supp. 1063.

**754** n. 20. The amendment of this Code provision in 1913 (c. 230) provides for the leaving of these papers, "If the defendant is a domestic corporation or joint-stock or other unincorporated association, at its principal office or place of business." For the words "of the defendant's residence," the amendment substitutes, "of the defendant's said place of business or office, or of his residence." After the word "wrapper," the following is now substituted: "addressed to the defendant at its said principal office or place of business, or to him at his place of residence, in the post-office at the place where he resides, or where said office, place of business or residence is located." This amendment is simply following out the other amendment (see ante, **752**) which permits substituted service on a corporation or association in addition to individuals.

**755.** Order set aside for failure to show proper efforts to make personal service. *McElpatrick v. Sire*, 120 N. Y. Supp. 64.

## CHAPTER IV

### SERVICE BY PUBLICATION

**759 § 735.** The following ground is added by amendment in 1913 (c. 179) viz., that of "a domestic corporation, where after diligent effort, service cannot be made within the state upon the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer or a director or managing agent." By amendment in 1914 of section 438 of the Code, the section is limited in

its application to order directing service by publication, the words "without the state or" being omitted.

759 n. 3. Service by publication does not authorize personal judgment in foreign country against person domiciled here. Judgment not binding here under rule of comity. Grubel v. Nassauer, 210 N. Y. 249, 103 N. E. 1113. Judgment rendered in foreign country on service solely by publication cannot be enforced in this state. Grubel v. Nassauer, 71 Misc. 585, 130 N. Y. Supp. 848. The judgment of a court of a sister state, recovered upon trustee process or attachment proceedings, in which the defendant is not personally served with process and does not appear, is effectual only to bind such property of the debtor as is found within the jurisdiction. It can form no basis for a personal judgment, and cannot affect the title of property not seized or attached, and not within the jurisdiction of the sovereignty where the proceedings are had. Heyl v. Taylor, 64 Misc. 31, 117 N. Y. Supp. 916. Trustee cannot be removed by divesting him of title. Holcomb v. Kelly, 114 N. Y. Supp. 1048.

760 n. 6. This subdivision is amended by Laws 1909, c. 492, by adding the following: "Or, is an unincorporated association consisting of seven or more persons, having a president and treasurer, neither of whom is a resident of this state."

760 n. 7. Plaintiff is not entitled to an order for publication in an action against a foreign corporation on a cause of action arising without the state, where defendant transacts no business in this state and has no property herein, and no attachment has been levied. Rutkosky v. Public Service R. Co., 155 App. Div. 631, 140 N. Y. Supp. 821 [ foll. Van Mater v. Post, 147 App. Div. 631 ].

761 n. 15. See also 780 § 754. Action to determine interests and establish lien on proceeds of insurance policy affects title to personal property within the state. Morgan

v. Mutual Benefit Life Ins. Co., 189 N. Y. 447, 82 N. E. 438. This applies to an action for dower where there are no tenants or occupants within the state. *Wetyen v. Fick*, 178 N. Y. 223, 233.

**763 n. 22.** This method of service is mandatory. *Sonn v. Kennedy*, 51 Misc. 234, 100 N. Y. Supp. 885. By amendment in 1914 this Code provision is limited to service by publication by striking out the words "without the state" after "service of a copy of the summons upon such person."

**763 n. 24.** Complaint and affidavits in an action against a nonresident must show that the court has jurisdiction of the subject-matter by showing that the cause of action arose within the state or that defendant has property here. *Van Mater v. Post*, 147 App. Div. 111, 131 N. Y. Supp. 805. If remedy sought is not available, the order should be refused. *Holmes v. Bell*, 139 App. Div. 455, 124 N. Y. Supp. 301.

**763 n. 24.** Complaint need not allege jurisdictional fact of plaintiff's residence within the state but it may be shown by affidavits. *Grant v. Greene*, 59 Misc. 1, 111 N. Y. Supp. 1089.

**764.** The cause of action must be one of which the court where suit is brought may take cognizance. *Grant v. Cobre Grande Copper Co.*, 126 App. Div. 750, 111 N. Y. Supp. 386 [reversed on other grounds in 193 N. Y. 306, 86 N. E. 34].

**764 n. 30.** *Grant v. Cobre Grande Copper Co.*, 126 App. Div. 750, 111 N. Y. Supp. 386 [reversed on ground that complaint stated cause of action in 193 N. Y. 306, 86 N. E. 34].

**765 § 740.** Sufficiency of affidavit to show nonresident defendant has property within the state, see *Van Mater v. Post*, 147 App. Div. 111, 131 N. Y. Supp. 805. The street address of defendant need not be given in the moving affidavits; and a mistake in the affidavits and in the mailing as to the street number is not fatal. *Dermin v. Duffy*, 83 Misc. 523, 145 N. Y. Supp. 354.

**766** n. 47. *Middleton v. Montague*, 152 App. Div. 702, 137 N. Y. Supp. 520.

**767**. Mere statements in the language of the statute as to nonresidence, diligence, etc., are insufficient. *Blute v. Fellowes*, 143 App. Div. 825, 128 N. Y. Supp. 18. Sufficiency of allegations as to nonresidence and diligence, see *Evans v. Weinstein*, 124 App. Div. 316, 108 N. Y. Supp. 753; *Sinnott v. Ennis*, 120 App. Div. 874, 105 N. Y. Supp. 218.

**767** n. 52. See also *McLaughlin v. McCann*, 123 App. Div. 67, 107 N. Y. Supp. 762.

**767** n. 53. There must be some competent proof of nonresidence. *Empire City Sav. Bank v. Silleck*, 98 App. Div. 139, 90 N. Y. Supp. 561.

**767** n. 54. See also *Murphy v. Franklin Savings Bank*, 116 N. Y. Supp. 228.

**767** n. 55. *Seidenburg v. Pesce*, 140 App. Div. 232, 125 N. Y. Supp. 107. The certificate of a sheriff that he has used due diligence, where the certificate is not made a part of, or referred to, in the moving papers, is insufficient. *Empire City Sav. Bank v. Silleck*, 98 App. Div. 139, 90 N. Y. Supp. 561.

**767** n. 56. *McLaughlin v. McCann*, 123 App. Div. 67, 107 N. Y. Supp. 762. But see *Stanton v. Eastman*, 116 N. Y. Supp. 852 [where an order based on such an affidavit was held good as against a collateral attack].

**768** n. 59. *Sunswick Land Co. v. Murdock*, 129 App. Div. 579, 114 N. Y. Supp. 436.

**768** n. 60. *Lewine v. Gerardo*, 60 Misc. 261, 112 N. Y. Supp. 192; *Kennedy v. Lamb*, 182 N. Y. 228, 74 N. E. 834 [which reverses 102 App. Div. 429, 92 N. Y. Supp. 385]. In the latter case the affidavit showed that the defendant resided in New Jersey and stated that "the plaintiff will be unable with due diligence to make personal service of the summons" but showed no attempt to make personal service nor excuse for not trying except that defendant resided in

New Jersey. It was held that no jurisdiction was conferred on the judge to grant the order, which could be collaterally attacked. In such a case, it is not sufficient to merely follow the words of the statute, but the facts must be stated to show the efforts made to personally serve the summons within the state.

**770 n. 67.** By 1914 amendment of section 440 of the Code the order may be made "by the court" or by a judge "thereof" or the county judge of the county where the action is triable.

**771 § 743.** The order is not jurisdictionally defective because it required "notice of object of action" to be served instead of the "complaint," where in fact the complaint was served and the order may be corrected and filed *nunc pro tunc*. *Mishkind-Feinberg Realty Co. v. Sidorsky*, 189 N. Y. 402, 82 N. E. 448 [affirming on this point 111 App. Div. 578, 98 N. Y. Supp. 496].

**771 n. 71.** By amendment of this section in 1914 the words "court or" are added before the word judge, in regard to the alternative statement. Newspapers in which publication ordered, see *Burgess v. Burgess*, 3 Current Ct. Dec. 24; *Bouraki v. Bouraki*, 3 Current Ct. Dec. 29.

**773.** If copy is required to be mailed "in the general post office in the county of New York" it is not sufficient to deposit copy in a mail chute. *Korn v. Lipman*, 201 N. Y. 404, 94 N. E. 861. Order requiring deposit in "post office" is complied with by dropping in a mail box in an office building. *Gay v. Ulrichs*, 136 App. Div. 809, 121 N. Y. Supp. 726.

**773 n. 85.** Specifying post office at New York, instead of Manhattan borough, is sufficient. *Gay v. Ulrichs*, 136 App. Div. 809, 121 N. Y. Supp. 726.

**775 § 744.** An order directing service of summons by publication should be vacated where defendant is a foreign corporation, does not appear, and has no property within the state. *Cuffey v. Grand Trunk Ry. Co.*, 67 Misc. 553, 122



N. Y. Supp. 647 [refusing to follow *Parke v. Gay*, 28 Misc. 329].

776 n. 102. Leaving the order with the clerk of one of twenty-one parts of the Supreme Court appointed to be held in New York county is not a "filing with the clerk." *Fink v. Wallach*, 47 Misc. 247, 95 N. Y. Supp. 872.

776 n. 105. By amendment in 1914 (c. 346) of this Code provision the alternative clause reads as follows: "or personal service upon the defendant without the state in lieu thereof." The words "personal" and "in lieu thereof" are added.

776 n. 107. Failure to state names of all of defendants in partition, as required by the Code, is not jurisdictional. *Close v. Calder Co.*, 139 App. Div. 175, 123 N. Y. Supp. 749.

778 § 750. See ante, 651 § 648.

780 § 754. The rules as to personal service without the state are materially changed by an amendment of section 443 of the Code in 1914 (c. 346) so as to make it read as follows:

"1. Where service is made without the state under an order for publication of the summons the papers specified in the last section must be previously filed; and a notice must be served with the summons, in all respects like the notice required by the last section, except that the words, 'without the state of New York' must be substituted for the words, 'by publication.'

"2. In all cases when publication is ordered, personal service of a copy of the summons and complaint and such notice, out of the state, is equivalent to publication and deposit in the post office.

"3. In the cases specified in subdivision five of section four hundred and thirty-eight the summons may be served without an order, upon a defendant without the state in the same manner as if such service were made within the state, except that a copy of the complaint shall be annexed to and served with the summons.

"4. Service without the state is complete ten days after proof thereof is filed.

"5. When the summons is served personally without the state the affidavit of service must show that the person making it is a resident of the state of New York, or a sheriff, under sheriff, deputy sheriff or constable of the county or other political subdivision in which the service is made, or an officer authorized by the laws of this state to take acknowledgments of deeds to be recorded in this state.

"6. A judgment shall be conclusive upon a defendant on whom the summons is personally served without the state, with respect to the property which is the subject of the action, or which is attached therein, to the same extent as if the service upon him were made within the state."

By this amendment, subd. 2-6 are all added as new matter, and subd. 1 is amended by adding the words "under an order for publication of the summons."

**781 n. 139.** This clause is stricken out by the amendment of section 441 of the Code in 1914 (c. 346), and instead thereof there is added to section 443 of the Code by the same amendment this clause: "4. Service without the state is complete ten days after proof thereof is filed."

**781 n. 141.** By amendment of this Code provision in 1914 (c. 346) this provision does not apply where service is made personally without the state. See also ante, **780 § 754.**

**781 § 756.** Section 1557, subdivision 1, of the Code expressly provides that so much of section 445 as requires the court to allow a defendant to defend after final judgment does not apply to an action for partition.

**782 n. 142.** Where the default is unexcused and no defense is shown, the judgment should not be set aside. *Bishop v. Hughes*, 117 App. Div. 425, 102 N. Y. Supp. 595.

## CHAPTER V

### PROOF OF SERVICE

**784 § 759.** Affidavits may overcome certificate of service on motion to vacate judgment on the ground that summons was never served. *Hertzberg v. Elvidge*, 79 Misc. 109, 140 N. Y. Supp. 670.

**785 § 760.** Evidence to overcome affidavit, see *Dan Talmage's Sons Co. v. Epstein*, 140 N. Y. Supp. 394.

**789 § 761.** Admission must identify the process served. *McKeever v. Supreme Court I. O. F.*, 122 App. Div. 465, 106 N. Y. Supp. 1041.

**791 § 764.** Proof where service is without the state under an order for publication of the summons, as provided for in 1914 amendment, see ante, **780 § 754**.

## CHAPTER VI

### DEFECTS, OBJECTIONS AND AMENDMENTS

**794 § 766.** An amendment may be allowed so to have the summons signed by one set of attorneys representing all the plaintiffs instead of by different attorneys representing different plaintiffs. *Jones v. Conlon*, 48 Misc. 172, 95 N. Y. Supp. 255. Defect in alias summons served is not fatal where copy of original is served and the latter is correct. *Conroy v. Bigg*, 109 N. Y. Supp. 914. On substituting name of corporation as defendant in place of its president sued individually, the substituted defendant must be served with process. *Ziegler v. George Schleicher Co.*, 56 Misc. 582, 107 N. Y. Supp. 85. The service of summons in one action cannot be set aside by motion in another. *Toma v. Foundation Co.*, 119 App. Div. 151, 104 N. Y. Supp. 263.

794 n. 4. The objection cannot be raised by answer. *Nellis v. Rowles*, 41 Misc. 313, 84 N. Y. Supp. 753.

795 n. 12. But see *Matter of Kopolinski*, 84 Misc. 96.

796. "A substitution of parties, of course, cannot be authorized under the guise of an amendment." *Jacobsohn v. Semel*, 129 N. Y. Supp. 95, 97. Pleadings, process, etc., under which a default judgment was rendered against "Samuel S." cannot be amended nunc pro tunc by substituting "Sigimund S." unless the latter was actually served and knew he was the party intended. *Jacobsohn v. Semel*, 129 N. Y. Supp. 95. Where an action is brought under a foreign statute by a widow in her representative capacity to recover damages for death caused by negligence, an amendment of the summons and complaint so as to allow the action to be continued by her in her individual capacity is proper. Otherwise as to amendment bringing in relatives of deceased as parties. *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953, 12 Civ. Pro. (N. S.) 31. Amendment of summons bringing in a new party defendant is of no validity unless the summons is served on such new party. *Concrete Pub. Co. v. Reed*, 70 Misc. 22, 126 N. Y. Supp. 653. Summons and complaint cannot be allowed to be amended by changing plaintiff's name from "The Concrete Publishing Company" to "The Concrete Age." *Concrete Pub. Co. v. Reed*, 70 Misc. 22, 126 N. Y. Supp. 653. A misnomer of defendant is amendable. *Ward v. Terry & Tench Const. Co.*, 118 App. Div. 80, 102 N. Y. Supp. 1066. Whether plaintiff ever obtained jurisdiction of the real defendant sought to be served cannot be determined on a motion to amend the summons because of a misnomer of defendant. *Levick v. Niagara Falls Home Tel. Co.*, 52 Misc. 290, 102 N. Y. Supp. 150.

796 n. 19. Mistake in making summons returnable in two instead of six days is amendable. *Spruhan v. Brown*, 116 N. Y. Supp. 568.

**796 n. 20.** Where summons directed to "Samuel" Jacobs is served on "Morris" Jacobs who represents he is "Samuel," the summons cannot be amended by changing the name "Samuel" to "Morris." *Fassy v. Jacobs*, 71 Misc. 545, 127 N. Y. Supp. 1062. So where agent is sued, principal cannot be brought in by amendment. *Booth v. Feldman Const. Co.*, 139 N. Y. Supp. 315. Where one, by mistake, but with notice which should have put him on inquiry, sues an individual as such when he should have sued a corporation of which the person sued was the president, an amendment will not be allowed, though the statute of limitations has, in the interim, become a bar to an action against the corporation. *Licauso v. Ashworth*, 78 App. Div. 486, 79 N. Y. Supp. 631.

**796 n. 23.** The summons as well as the complaint must be amended. *Southack v. Gleason*, 49 Misc. 445, 98 N. Y. Supp. 859.

**796 n. 25.** *Limbert v. Joline*, 62 Misc. 631, 115 N. Y. Supp. 1089; *Hirsch v. Camman*, 56 Misc. 349, 106 N. Y. Supp. 814; *Levick v. Niagara Falls Home Tel. Co.*, 52 Misc. 290, 102 N. Y. Supp. 150; *Matter of Korpolinski*, 84 Misc. 96; *Fisher v. Independent Brothers of Nieshweiser*, 84 Misc. 382, 147 N. Y. Supp. 390.

**797 n. 26.** Prior to the trial, the words "as substituted trustee under the will of \* \* \* deceased," after the name of defendant, may be allowed to be stricken out of the title of the summons and complaint, notwithstanding the statute of limitations would bar a new action against the defendant in its individual capacity. *Boyd v. United States Mortg. & Trust Co.*, 84 App. Div. 466, 82 N. Y. Supp. 1001. See also *Kerrigan v. Peters*, 108 App. Div. 292, 95 N. Y. Supp. 723; *Southack v. Gleason*, 49 Misc. 445, 98 N. Y. Supp. 859.

**797 n. 32.** Rule applied to amendment of complaint. *Van Tuyl v. New York Real Estate Secur. Co.*, 153 App. Div. 409, 138 N. Y. Supp. 54.

**797** n. 34. If the amendment is of a misnomer of defendant, notice must be given to the real defendant intended to be sued. *Levick v. Niagara Falls Home Tel. Co.*, 52 Misc. 290, 102 N. Y. Supp. 150.

**798** § 767. Jurisdiction of the subject-matter cannot be questioned by a motion to set aside the service of summons. *Mallory v. Virginia Hot Springs Co.*, 157 App. Div. 253, 141 N. Y. Supp. 961. Jurisdiction of the subject-matter cannot be questioned on motion to set aside the service of summons unless such want of jurisdiction clearly appears. *Manning, Maxwell & Moore v. Canadian Locomotive Co.*, 120 App. Div. 735, 105 N. Y. Supp. 662.

**799** n. 48. *G. P. Sherwood & Co. v. Artistic Marble Co.*, 125 N. Y. Supp. 566; *American Oilcloth Co. v. Slonov*, 59 Misc. 218, 110 N. Y. Supp. 289. If the person served is notified in writing that no claim is made against him individually, he cannot compel plaintiff's attorney to accept service of his notice of appearance and his answer which defends on the merits. *Steinhaus v. Enterprise Vending Mach. Co.*, 39 Misc. 797, 81 N. Y. Supp. 282. And see *Garvey v. Folk*, 58 Misc. 367, 111 N. Y. Supp. 175.

**800.** Summons served on wrong person cannot be amended so as to make him a party, where he objects. *Fleishner v. Sacks*, 140 N. Y. Supp. 409.

**800** n. 54. Rule applied to special proceedings in *Martin v. Crossley*, 46 Misc. 254, 91 N. Y. Supp. 712.

## CHAPTER VII

## APPEARANCE

**804** n. 6. See also *Garvey v. Folk*, 58 Misc. 367, 111 N. Y. Supp. 175.

**804** n. 13. One of several executors who are sued together may appear so as to bind all. *Montgomery v. Boyd*, 78 App. Div. 64, 73, 79 N. Y. Supp. 879.

**804** § 770. See also post, **937** n. 7.

**805** n. 18. *Littauer v. Stern*, officially reported in 88 App. Div. 274, is affirmed in 177 N. Y. 233.

**805** § 771. An executor sued both individually and as executor may appear by different attorneys. *Roche v. O'Connor*, 95 App. Div. 496, 88 N. Y. Supp. 968.

**805** § 772. A defendant not served and expressly disavowing a voluntary appearance is not concluded by the judgment by indemnifying and conducting a codefendant's defense. *Nathan Mfg. Co. v. Edna Smelting & Refining Co.*, 130 App. Div. 518, 114 N. Y. Supp. 1037.

**806**. Indorsement of attorney's name on a bond given to release a judgment is not a general appearance. *Engels Exp. Co. v. Ferguson*, 79 Misc. 40, 138 N. Y. Supp. 1086.

**806** n. 27. *Stokes v. Schildknecht*, 85 App. Div. 602, 83 N. Y. Supp. 358. See *Steinman v. Hemens*, 3 Current Ct. Dec. 39. Obtaining order to show cause why temporary injunction should not be vacated is not such an appearance as entitles defendant to notice of subsequent proceedings. *Regelmann v. South Shore Traction Co.*, 67 Misc. 590, 123 N. Y. Supp. 353.

**807**. Motion to open default judgment is a waiver of service of summons, and thereafter defendant will not be permitted to serve an amended answer setting up want of service. *Tierney v. Helvetia Swiss Fire Ins. Co.*, 138 App. Div. 469, 122 N. Y. Supp. 869. Procuring order to show

cause why default judgment should not be set aside waives objection to want of service of summons. *B. Crystal & Son v. Ohmer*, 79 Misc. 227, 138 N. Y. Supp. 841.

807 n. 30. See also *Tisdale v. Rider*, 119 App. Div. 594, 104 N. Y. Supp. 77.

810 § 776. This rule was repealed in 1910, evidently because the practice was obsolete.

810 § 777. Definition. *De Graff v. De Graff*, 128 N. Y. Supp. 672, 674 [quoting *Nichols' Pr.*].

810 n. 47. *Holcomb v. Kelly*, 114 N. Y. Supp. 1048.

811 n. 50. Motion to set aside judgment for nonservice of process is not equivalent to a general appearance. *Friedberger v. Stulpnagel*, 59 Misc. 498, 112 N. Y. Supp. 89.

812. Where affidavits taken before the plaintiff's attorney of record as commissioner of deeds, though irregular, were sufficient to confer jurisdiction upon the judge to grant the order for service by publication, the court acquired jurisdiction over defendant to proceed with the cause, so that defendant, on a special appearance, cannot attack the irregularity. *De Graff v. De Graff*, 128 N. Y. Supp. 672.

814. Appearance waives failure of complaint to state facts as to residence of the parties so as to show jurisdiction. *Wells v. Scofield*, 157 App. Div. 8, 141 N. Y. Supp. 657.

814 n. 64. *Freeman v. Freeman*, 126 App. Div. 601, 110 N. Y. Supp. 686; *Wilkinson v. New York City R. Co.*, 50 Misc. 652, 99 N. Y. Supp. 380. See also *Bowman v. Seaman*, 152 App. Div. 690, 137 N. Y. Supp. 568. Code rule is merely declaratory of the common law. *Strauss v. Strauss*, 122 App. Div. 729, 107 N. Y. Supp. 842. But the subsequent appearance of defendant by attorney in a divorce suit does not confer jurisdiction where he was personally served in a sister state but without any order of court. *Freeman v. Freeman*, 57 Misc. 400, 109 N. Y. Supp. 705.

814 n. 71. *Bohnkoff v. Kennedy*, 129 App. Div. 32, 113



N. Y. Supp. 133; *Browning v. Moses*, 60 Misc. 111, 111 N. Y. Supp. 651.

**816** n. 85. Rule applied to special proceedings. *Martin v. Crossley*, 46 Misc. 254, 91 N. Y. Supp. 712.

**818** n. 100. A party should not be allowed to withdraw a general appearance for the purpose of enabling him to plead the statute of limitations, especially when that defense was not available at the time the notice of appearance was served. *Bohnhoff v. Kennedy*, 129 App. Div. 32, 113 N. Y. Supp. 133.

## PART IV

### PLEADING

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#### CHAPTER I

##### GENERAL RULES RELATING TO PLEADINGS

**821** n. 8. *Worthington v. Worthington*, 100 App. Div. 332, 91 N. Y. Supp. 443.

**824.** Facts recited in an annexed instrument and made a part of the complaint are well pleaded. *Spence v. Woods*, 134 App. Div. 182, 118 N. Y. Supp. 807.

**824** n. 26. So may plead the party "purchased" the interest of another. *Rosenbaum v. New York*, 59 Misc. 30, 109 N. Y. Supp. 775.

**825** n. 31. *Williamson v. Wager*, 90 App. Div. 186, 191, 86 N. Y. Supp. 684.

**825** § 789. Where the fact to be stated is the result of other facts, the resultant facts, not those furnishing evidence thereof, should be stated. *Williamson v. Wager*, 90 App. Div. 186, 191, 86 N. Y. Supp. 684.

**826** n. 36. See *Ford v. Chase*, 118 App. Div. 605, 103 N. Y. Supp. 30.

**826** n. 37. See also *Ring v. Mitchell*, 45 Misc. 493, 92 N. Y. Supp. 749. The office of a complaint is to allege the facts, not the evidence from which the existence of a fact may be deduced, and to allege facts which merely lead to the presumption of the ultimate fact upon which plaintiff's right

rests is to plead evidence and not facts. *Hawes v. Board of Education*, 160 App. Div. 516, 145 N. Y. Supp. 575.

826 n. 38. *Kleinbohe v. Hoffman House*, 50 Misc. 127, 97 N. Y. Supp. 1122.

827 § 791. "The rule that a fact once shown to have existed is presumed to have continued until the contrary be shown is one of evidence, not of pleading." *Martin v. Palmer*, 156 App. Div. 327, 328, 141 N. Y. Supp. 396.

828 § 792. See also post, 961 n. 180. The following have been held conclusions of law: That plaintiff has an adequate remedy at law. *Schiefer v. Freygang*, 125 App. Div. 498, 109 N. Y. Supp. 848. "Duly cancelled" a policy. *Mincho v. Bankers' Life Ins. Co.*, 124 App. Div. 578, 109 N. Y. Supp. 179. Negligence. *People v. Equitable Life Assur. Society of the United States*, 124 App. Div. 714, 109 N. Y. Supp. 453. Allegation of waiver. *Wyatt v. Wanamaker*, 58 Misc. 429, 110 N. Y. Supp. 900. Allegation that claims were compromised and settled. *Goffe v. Jones*, 132 App. Div. 864, 117 N. Y. Supp. 407. Allegation that defendant defaulted on a contract. *Davis v. Silverman*, 98 App. Div. 305, 90 N. Y. Supp. 589. Mere allegation, in a libel suit, that the charge is true. *Bingham v. Gaynor*, 203 N. Y. 27, 96 N. E. 84 [aff. 141 App. Div. 301]. Alleging irreparable damage. *Longenecker v. Longenecker Bros.*, 140 N. Y. Supp. 403. Alleging that defendant's signs mislead the public to plaintiff's damage. *Longenecker v. Longenecker Bros.*, 140 N. Y. Supp. 403. Allegation that "no legal obstacle or impediment to compliance" with demand of sheriff, existed. *Hoffman v. Columbia-Knickerbocker Trust Co.*, 157 App. Div. 434, 142 N. Y. Supp. 445. Alleging that telephone service was defective and of no value as is an allegation that defendant "could not use the same." *New York Telephone Co. v. Simon*, 77 Misc. 192, 137 N. Y. Supp. 542. So the allegation "for a valuable consideration" is a conclusion of law. *White v. Western U. Teleg. Co.*, 153

App. Div. 684, 138 N. Y. Supp. 598; *Browning King & Co. v. Terwilliger*, 144 App. Div. 516, 129 N. Y. Supp. 431; *Kinsella v. Lockwood*, 79 Misc. 619, 140 N. Y. Supp. 513. *Contra*, *St. Lawrence Co. Nat'l Bank v. Watkins*, 153 App. Div. 551, 138 N. Y. Supp. 116 [rev. 76 Misc. 633, 135 N. Y. Supp. 461]. Mere general allegation of waiver of conditions precedent, amounting to conclusion of law, is insufficient. *Carlin Constr. Co. v. New York & Bklyn. Brewing Co.*, 134 N. Y. Supp. 493. Defense that contract was a gambling contract must be pleaded. *Moore v. Blanck*, 71 Misc. 257, 129 N. Y. Supp. 1105. But an allegation that statute was passed changing the condition of racing is not a conclusion of law. *Farnham v. Le Bolt & Co.*, 133 App. Div. 520, 117 N. Y. Supp. 730. So "purchased" is not a conclusion. *Rosenbaum v. New York*, 59 Misc. 30, 109 N. Y. Supp. 775. And an allegation that lessor "elected" to pay value of building erected by tenant is not a conclusion. *Eisner v. Pringle Memorial Home*, 130 App. Div. 559, 115 N. Y. Supp. 58. So alleging that one defendant succeeded to the business of another and assumed all his liabilities is not a conclusion of law. *Automatic Strapping Machine Co. v. Twisted Wire & Steel Co.*, 142 N. Y. Supp. 6. "Mutually agreed" is sufficient. *Grossman v. Schenker*, 206 N. Y. 466, 100 N. E. 39. An allegation that a party had no valid claim or lien upon certain property is a conclusion of law. *Gavazzi v. Dryfoos*, 110 App. Div. 90, 97 N. Y. Supp. 59. The allegation "that there never was any valuable or other legal consideration" is equivalent to an allegation that there was no consideration, and is the allegation of a fact and not of a conclusion. *First Nat. Bank of Towanda v. Robinson*, 105 App. Div. 193, 94 N. Y. Supp. 767. So an allegation that a written instrument was "duly" assigned is sufficient. *Levy v. Cohen*, 103 App. Div. 195, 92 N. Y. Supp. 1074. And, in an action for malicious prosecution, an allegation that, before a magistrate, the defendant "falsely

and maliciously and without just cause or provocation charged the plaintiff," etc., is a good plea of want of probable cause. *Bregman v. Kress*, 83 App. Div. 1, 81 N. Y. Supp. 1072. An allegation that "plaintiff is not a bona fide holder in due course of said note" is bad as a conclusion of law, as is an allegation that a note had, "before its delivery to said plaintiff, no legal inception." *Rogers v. Morton*, 46 Misc. 494, 95 N. Y. Supp. 49.

828 n. 55. *Schwabe v. Herzog*, 161 App. Div. 712, 146 N. Y. Supp. 644; *Schnabel v. Hanover Nat'l Bk.*, 78 Misc. 35, 137 N. Y. Supp. 727. See also *Gansevoort Bank v. Empire State Surety Co.*, 112 App. Div. 500, 98 N. Y. Supp. 382.

828 n. 58. *Hungerford v. Waverly*, 125 App. Div. 311, 109 N. Y. Supp. 438.

828 n. 59. *Cash v. Amer. Specialty Tailoring Co.*, 157 App. Div. 729, 142 N. Y. Supp. 767; *American Exch. Nat'l Bk. v. Goubert*, 135 App. Div. 371, 120 N. Y. Supp. 397; *Chicago Crayon Co. v. Slattey*, 68 Misc. 148, 123 N. Y. Supp. 987; *McCarthy v. Fitzgerald*, 139 N. Y. Supp. 950; *Poland v. Hollander*, 62 Misc. 523, 115 N. Y. Supp. 1042; *Mitchell v. Dunmore Realty Co.*, 60 Misc. 563, 112 N. Y. Supp. 659; *Sparks v. Ducas*, 123 App. Div. 507, 108 N. Y. Supp. 546; *Tate v. American Woolen Co.*, 114 App. Div. 106, 99 N. Y. Supp. 678. Allegation that certain sum is due less a sum to be "offset" is a conclusion of law. *Young v. Stillwater Crushed Stone Co.*, 153 App. Div. 453, 138 N. Y. Supp. 539.

828 n. 61. *Ludlow v. Woodward*, 117 App. Div. 525, 102 N. Y. Supp. 647; *Burdick v. Chesebrough*, 94 App. Div. 532, 535, 88 N. Y. Supp. 13. If the facts pleaded to show title are defective, a subsequent general allegation of title does not cure the defect. *Martin v. Palmer*, 156 App. Div. 327, 141 N. Y. Supp. 396.

828 n. 63. *Eppley v. Kennedy*, 131 App. Div. 1, 115

N. Y. Supp. 360; *Ellis v. Keeler*, 126 App. Div. 343, 110 N. Y. Supp. 542; *Knowles v. New York*, 176 N. Y. 430, 437, 68 N. E. 860. Allegations that acts were fraudulent and collusive are conclusions. *Wallace v. Jones*, 182 N. Y. 37, 74 N. E. 576. Facts showing fraud need not be characterized as fraud. *Townsend v. Meyers*, 134 App. Div. 540, 119 N. Y. Supp. 478.

829 n. 65. *Armstrong v. Heide*, 47 Misc. 609, 94 N. Y. Supp. 434.

829 n. 66. That directors had "no power or authority." *Vonnoh v. Sixty-Seventh St. Atelier Bldg.*, 55 Misc. 222, 105 N. Y. Supp. 155.

829 n. 68. *Meehan v. Flaherty*, 119 App. Div. 128, 103 N. Y. Supp. 1058.

829 n. 71. *Nillson v. Lawrence*, 148 App. Div. 678, 133 N. Y. Supp. 293; *Ellis v. Keeler*, 126 App. Div. 343, 110 N. Y. Supp. 542; *Peerrot v. Mt. Morris Bank*, 120 App. Div. 247, 104 N. Y. Supp. 1045; *Petty v. Emery*, 96 App. Div. 35, 88 N. Y. Supp. 823; *Burdick v. Chesebrough*, 94 App. Div. 532, 535, 88 N. Y. Supp. 13. Contract "illegal." *Vonnoh v. Sixty-Seventh St. Atelier Bldg.*, 55 Misc. 222, 105 N. Y. Supp. 155. Alleging defendants did things "wrongfully and maliciously" is a conclusion of law. *De Jong v. Behrman Co.*, 148 App. Div. 37, 131 N. Y. Supp. 1083.

829 n. 73. *Ludlow v. Woodward*, 117 App. Div. 525, 102 N. Y. Supp. 647; *Wenk v. New York*, 82 App. Div. 584, 81 N. Y. Supp. 583.

829 n. 76. *Wertheim v. Maintenance Co.*, 135 App. Div. 760, 119 N. Y. Supp. 909.

829 n. 77. Alleging indebtedness is "due" is sufficient where facts constituting indebtedness are alleged. *Wood Mfg., etc., Co. v. Johnstone*, 148 App. Div. 747, 133 N. Y. Supp. 422.

830 n. 85. *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. Y. Practice—13

N. E. 721. Under the rule that the evidence or the facts establishing a fact entering into a cause of action or a defense need not be pleaded, it is sufficient to merely allege that a person has ratified an act, since ratification is a conclusion of fact and not a conclusion of law. *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721 [mod. 150 App. Div. 715, 135 N. Y. Supp. 789].

830 n. 88. *Burdick v. Chesebrough*, 94 App. Div. 532, 536, 88 N. Y. Supp. 13.

830 n. 89. *Williamson v. Wager*, 90 App. Div. 186, 86 N. Y. Supp. 684.

832 n. 105. Public statute need not be pleaded. *People v. O'Brien*, 78 Misc. 679, 140 N. Y. Supp. 257; *Van Tuyl v. New York Real Estate Secur. Co.*, 153 App. Div. 409, 138 N. Y. Supp. 541 [aff. in 207 N. Y. 691, 101 N. E. 1096]; *Shattuck v. Guardian Trust Co.*, 204 N. Y. 200, 97 N. E. 517 [reversing on other grounds but affirming on this point 145 App. Div. 734, 130 N. Y. Supp. 658].

833 § 794. More latitude in pleading in equity than in law. *Isaacs v. Salomon*, 159 App. Div. 675, 144 N. Y. Supp. 876. Vice of irrelevancy much more serious in complaint than in answer. *Isaacs v. Salomon*, 159 App. Div. 675, 144 N. Y. Supp. 876.

833 n. 120. *Hanson Co. v. Collier*, 51 Misc. 496, 101 N. Y. Supp. 690 [citing *Nichols' N. Y. Pr. § 794*]. Matter which can have no bearing on the issues either on account of its manifest irrelevancy or because the law declares that it cannot be introduced, is irrelevant. *Ugla v. Brokaw*, 77 App. Div. 314, 79 N. Y. Supp. 244.

833 n. 121. In a suit in equity the pleader is not confined with the same degree of strictness to alleging the material facts only as in an action at law. Allegations of inducement are permissible in a complaint in equity. *McGarahan v. Sheridan*, 106 App. Div. 532, 94 N. Y. Supp. 708. Striking out statements of evidence, see post, 1067 n. 52.

833 n. 124. *Hanson Co. v. Collier*, 51 Misc. 496, 101 N. Y. Supp. 690 [citing *Nichols' N. Y. Pr.* § 794].

837 n. 146. The complaint may state a cause of action for personal injuries as at common law and also state it according to the Employers' Liability Act. *Mulligan v. Erie R. Co.*, 99 App. Div. 499, 91 N. Y. Supp. 60; *Kleps v. Bristol Mfg. Co.*, 107 App. Div. 488, 95 N. Y. Supp. 337; *Acardo v. N. Y. Contracting Co.*, 116 App. Div. 793, 102 N. Y. Supp. 7; *Young v. Bradley & Son*, 129 App. Div. 678, 114 N. Y. Supp. 264.

839 n. 159. See *Citizens' Central Nat. Bank v. Munn*, 115 App. Div. 471, 101 N. Y. Supp. 435.

842 n. 184. See *Gibbs v. Knickerbocker Sav. & L. Co.*, 153 App. Div. 369, 138 N. Y. Supp. 515.

843. It is not sufficient that defendants "one or both of them" committed the act complained of. *New York Herald v. Town Topics Pub. Co.*, 3 Current Ct. Dec. 50.

843 n. 190. *Hasberg v. Moses* is officially reported in 81 App. Div. 199. *Mutual Life Ins. Co. v. McCurdy*, 118 App. Div. 815, 103 N. Y. Supp. 829. The alternative relief must be demanded against the same defendant. *Cohn-Baer-Myers & Aronson Co. v. Realty Transfer Co.*, 117 App. Div. 215, 102 N. Y. Supp. 122.

846 n. 211. But see *Stroock Plush Co. v. Talcott*, 129 App. Div. 14, 113 N. Y. Supp. 214.

847 n. 225. *McGehee v. Cooke*, 55 Misc. 40, 105 N. Y. Supp. 60 [citing 1 *Nichols' N. Y. Pr.* 847].

848 n. 228. In an action for libel, a complaint not alleging any specific date of the publication of the defamatory matter is too indefinite. *Cerro De Pasco Tunnel & Min. Co. v. Haggin*, 106 App. Div. 388, 94 N. Y. Supp. 593.

848 n. 231. The names of those who are necessarily referred to in a pleading and their interest should appear with certainty. In the absence of an averment that their names are unknown, parties referred to as "others" must



be made definite and certain. *Smith v. Irvin*, 45 Misc. 262, 92 N. Y. Supp. 170.

849. Sufficient to plead defense in the words of the statute, *Gibbs v. Knickerbocker Sav. & L. Co.*, 153 App. Div. 369, 138 N. Y. Supp. 515. "A plea is not avoided because a statute referred to therein is codified, without material change, into a later general law." *Dwyer v. Corrugated Paper Products Co.*, 80 Misc. 412, 413, 141 N. Y. Supp. 240.

849 n. 233. Rule applies to city charter. *Kosters v. National Bank of Auburn*, 62 Misc. 419, 116 N. Y. Supp. 647.

849 n. 236. Merely alleging action is brought in accordance with a certain act of a sister state, giving the title, is insufficient. *Howlan v. New York & N. J. Telephone Co.*, 131 App. Div. 443, 115 N. Y. Supp. 316.

850 n. 244. The illegality of a claim may be pleaded in the words of the statute. *Gibbs v. Knickerbocker Sav. & L. Co.*, 153 App. Div. 369, 138 N. Y. Supp. 515.

851 n. 246. *Seydel v. Corporation Liquidating Co.*, 46 Misc. 576, 92 N. Y. Supp. 225. Must negative exceptions. *Troughton v. Grace*, 151 App. Div. 655, 136 N. Y. Supp. 200; *Sutton v. Butler*, 74 Misc. 251, 133 N. Y. Supp. 936.

851 n. 251. *Benedict v. Clarke*, 139 App. Div. 242, 123 N. Y. Supp. 964; *Bouton v. Wheeler*, 118 App. Div. 426, 104 N. Y. Supp. 33; *Zierner v. Crucible Steel Co.*, 99 App. Div. 169, 90 N. Y. Supp. 962. Alleging that a judgment was "duly rendered" in a court of another state sufficiently avers the jurisdiction of the court as against demurrer. *Benedict v. Clarke*, 139 App. Div. 242, 123 N. Y. Supp. 964.

851 n. 253. *Edgerly v. Blackburn*, 141 App. Div. 419, 125 N. Y. Supp. 353. See also *Hottenroth v. Flaherty*, 61 Misc. 108, 112 N. Y. Supp. 1111.

852 n. 255. *Brooklyn Heights Co. v. Brooklyn City, etc., Co.*, 151 App. Div. 465, 135 N. Y. Supp. 990; *Kosovits v. N. Y. First Hungarian St. Stephen's Soc.*, 130 N. Y. Supp.

72. Waiver of architect's certificate cannot be shown unless pleaded. *Granger Co. v. Brown-Ketchum Iron Wks.*, 204 N. Y. 218, 97 N. E. 523.

852 n. 256. *Murphy v. Hart*, 122 App. Div. 548, 107 N. Y. Supp. 452; *Williams v. Fire Ass'n of Philadelphia*, 119 App. Div. 573, 104 N. Y. Supp. 100; *Vandegrift v. Bertron*, 83 App. Div. 548, 82 N. Y. Supp. 153. Must establish performance if allegation controverted. *Lucas E. Moore Stave Co. v. M. Mosson Co.*, 57 Misc. 648, 108 N. Y. Supp. 883. May either allege performance in detail or use Code term. *Feuerstein v. German Union Fire Ins. Co.*, 141 App. Div. 456, 126 N. Y. Supp. 201. Facts set forth to show performance held not to destroy conclusion as pleaded. *Moghabghab v. Sherman & Sons Co.*, 161 App. Div. 135.

852 n. 257. *Smith v. Cary*, 160 App. Div. 119, 145 N. Y. Supp. 99.

853. Allegation of compliance with every one of the terms, conditions and agreements of a policy is not equivalent to an allegation of due performance. *Feuerstein v. German Union Fire Ins. Co.*, 141 App. Div. 456, 126 N. Y. Supp. 201. Alleging due performance is insufficient where facts stated show the contrary. *Pease Oil Co. v. Monroe Co. Oil Co.*, 78 Misc. 285, 138 N. Y. Supp. 177.

853 n. 262. *Williams v. Fire Ass'n of Philadelphia*, 119 App. Div. 573, 104 N. Y. Supp. 100.

853 n. 263. *Grant v. Cobre Grande Copper Co.*, 126 App. Div. 750, 111 N. Y. Supp. 386 [reversed on other grounds in 86 N. E. 34]; *Alend Speare's Sons Co. v. Casein Co.*, 53 Misc. 58, 103 N. Y. Supp. 1015; *Glazer v. Home Ins. Co.*, 48 Misc. 515, 96 N. Y. Supp. 136. See also *Carlin Const. Co. v. New York & Brooklyn Brewing Co.*, 134 N. Y. Supp. 493.

853 n. 266. See also *Gansevoort Bank v. Empire State Surety Co.*, 117 App. Div. 455, 102 N. Y. Supp. 544. Alleg-

ing that plaintiff performed the contract "fully and entirely" is not sufficient. *Rosenthal v. Rubin*, 148 App. Div. 44, 132 N. Y. Supp. 1053.

**853** n. 268. *Hilton & Dodge Lumber Co. v. Sizer & Co.*, 137 App. Div. 661, 122 N. Y. Supp. 306; *Guarino v. Firemen's Ins. Co.*, 44 Misc. 218, 88 N. Y. Supp. 1044.

**854** n. 272. An allegation that there is a specified sum due plaintiff from defendant is necessary in an action on a note. *Elkan v. Edwards*, 112 N. Y. Supp. 1107.

**854** n. 276. Failure to object, before the opening of the trial, in an action on a policy, to the plaintiff's failure to attach a copy of the policy to the complaint, where the answer admitted the making of the policy as alleged in the complaint, and where defendant has one form of policy and it is the duty of its secretary to keep a record of all of its policies of insurance, precludes an attack on the sufficiency of the complaint. *Nugent v. Rensselaer County Mut. Fire Ins. Co.*, 106 App. Div. 308, 94 N. Y. Supp. 605.

**854** n. 280. *Lafayette Trust Co. v. Lacher*, 139 App. Div. 797, 124 N. Y. Supp. 401. See also *Didato v. Coniglio*, 50 Misc. 280, 100 N. Y. Supp. 466.

**855** n. 286. *Nunnally v. Tribune Ass'n*, 111 App. Div. 485, 97 N. Y. Supp. 908; *Townes v. N. Y. Evening Journal Pub. Co.*, 109 App. Div. 852, 96 N. Y. Supp. 822. It is unnecessary, in the complaint, to allege in detail, the facts essential to connect plaintiff with the libel. *Corr v. Sun Print. & Pub. Ass'n*, 177 N. Y. 131, 135, 69 N. E. 288; *Bianchi v. Starr Co.*, 46 Misc. 486, 95 N. Y. Supp. 28. See *Van Hensen v. Argenteau*, 194 N. Y. 309, 87 N. E. 437 [reversing 124 App. Div. 776, 109 N. Y. Supp. 238]; *McNamara v. Goldan*, 194 N. Y. 315, 87 N. E. 440 [affirming mem. decision in 108 N. Y. Supp. 1139]. Must plead facts to show that plaintiff is the person libelled, where no statement in conformity with Code, § 535. *Lawrence v. Sun Printing, etc., Assoc.*, 135 App. Div. 368, 120 N. Y. Supp. 384.

**856 n. 289.** *Rivers v. New York Evening Journal Pub. Co.*, 120 App. Div. 574, 104 N. Y. Supp. 1081.

**857 § 800.** Cited by Spencer, J., in *Stone v. Hudson Valley R. Co.*, 47 Misc. 5, 95 N. Y. Supp. 220 (which held that an action to recover assessments against a member of a casualty association was not an action on an account).

**858 n. 292.** If plaintiff sets forth fully his account in the complaint, particulars will not be ordered. *Wilson & Baillee Mfg. Co. v. Dumary*, 140 App. Div. 838, 125 N. Y. Supp. 803.

**858 n. 297.** But where the account stated is not itself composed of items and the correctness of the original account is not questioned, the rule is otherwise. *Herbert v. Hellbut*, 119 App. Div. 426, 104 N. Y. Supp. 699.

**858 n. 299.** *Smith v. Irvin*, 116 App. Div. 359, 101 N. Y. Supp. 904. Where the action is deemed to be one in which defendants are not entitled as of right to demand a bill of particulars or copy of account, plaintiff's attorney may move to strike out the demand, in order to relieve himself from the necessity of determining, at his peril, whether the case is one in which a demand is a matter of right. *Main v. Pender*, 88 App. Div. 237, 85 N. Y. Supp. 428. It is immaterial that the motion is not made and heard within ten days after the service of the demand. *Stone v. Hudson Valley R. Co.*, 47 Misc. 5, 95 N. Y. Supp. 220.

**859 § 802.** A receipt and statement of amount due, signed by plaintiff, is not sufficient. *Beirne v. Sanderson*, 83 App. Div. 62, 82 N. Y. Supp. 493.

**860 n. 313.** Compare *Hein v. Honduras Syndicate*, 138 App. Div. 786, 123 N. Y. Supp. 431.

**861 n. 315.** *Smith v. Irvin*, 116 App. Div. 359, 101 N. Y. Supp. 904.

**861 § 805.** Its office is not to require the production of a written instrument for examination to determine whether

it is properly executed and genuine. *Herrington v. Davitt*, 78 Misc. 199, 139 N. Y. Supp. 198.

862 n. 325. *Kraus & Co. v. Mayer*, 150 App. Div. 122, 134 N. Y. Supp. 694. See *Baruch v. Young*, 149 App. Div. 466, 134 N. Y. Supp. 53; *Kellogg v. Griffiths*, 124 App. Div. 513, 108 N. Y. Supp. 962. For mistaking the practice, costs should not be imposed. *Urdike v. Mace*, 156 App. Div. 381, 141 N. Y. Supp. 587.

862 n. 326. This clause is stricken out by Laws 1904, c. 500, and the following sentence is substituted: "Upon application, in any case, the court, or a judge authorized to make an order in the action, may, upon notice, direct a bill of particulars of the claim of either party to be delivered to the adverse party, and in case of default the court shall preclude him from giving evidence of the part or parts of his affirmative allegation of which particulars have not been delivered." It seems that defendant may be compelled to disclose whether an agreement upon which he relies was oral or written. *Knickerbocker Trust Co. v. Packard*, 109 App. Div. 421, 96 N. Y. Supp. 412. A bill of particulars is not necessary, it seems, to enable the defendant to answer, where the defendant has or has not knowledge sufficient to admit or deny, since he may deny knowledge or information sufficient to form a belief. *Hicks v. Eggleston*, 95 App. Div. 162, 88 N. Y. Supp. 528; *United States Casualty Co. v. Jamieson*, 122 App. Div. 608, 107 N. Y. Supp. 490. A bill will not be ordered, on motion of defendant, where the conceded facts entitle plaintiff to an accounting by the defendant. *Heidenreich v. Hirsh*, 85 App. Div. 319, 83 N. Y. Supp. 366.

862 n. 327. *Loewenthal v. Globe & Rutgers Ins. Co.*, 116 N. Y. Supp. 454. There is a limit to such discretion,—the court cannot require a plaintiff to furnish the particulars of evidence not within his power to furnish or preclude him from giving proper evidence on the trial because of inability

to specify in advance what such evidence will disclose. Where the order so requires a question of law is presented which is reviewable in the Court of Appeals. *People v. McClellan*, 191 N. Y. 341, 84 N. E. 68 [reversing on other grounds 124 App. Div. 215].

862 n. 328. *Swan v. Swan*, 44 Misc. 163, 89 N. Y. Supp. 794. Particulars of mere defense may be required. *Reader v. Haggin*, 123 App. Div. 489, 107 N. Y. Supp. 963; *Spitz v. Heinze*, 77 App. Div. 317, 79 N. Y. Supp. 187. Includes both defenses and counterclaims. *Huber Brewery v. Sieke*, 146 App. Div. 467, 131 N. Y. Supp. 271. May be required as to items which defendant must prove affirmatively in reduction of plaintiff's claim. *McCoal v. Merrill-Ruckgaber Co.*, 129 N. Y. Supp. 377. Entitled to bill as to particulars of counterclaim for failure to perform, in action for services as builder. *Herrman v. Leland*, 148 App. Div. 641, 133 N. Y. Supp. 271. Entitled to bill as to counterclaim for damages from negligence, in action for reasonable value of materials and services under a building contract. *Duff & Sons v. Levin*, 76 Misc. 249, 134 N. Y. Supp. 903.

862 § 807. That plaintiff has examined books and officers of defendant corporation warrants a bill of particulars from him in an action for an accounting for mismanagement. *Tilton v. Gans*, 155 App. Div. 612, 140 N. Y. Supp. 782. Protecting secrecy of list of customers not ground for denying, see *Reincke v. Texas Co.*, 150 App. Div. 210, 134 N. Y. Supp. 752. Bill of particulars of defenses will not be ordered on the theory that they are inconsistent. *Kraus & Co. v. Mayer*, 150 App. Div. 122, 134 N. Y. Supp. 694. Plaintiff should not be required to furnish particulars as to matter material only in rebuttal of a defense set up in the answer. *Hague v. Northern Hotel Co.*, 77 Misc. 142, 135 N. Y. Supp. 1047. Where new matter is not a counterclaim, bill will not be refused in regard thereto because there was no reply. *Bowsky v. Schlichten*, 76 Misc. 206, 134 N. Y. Supp.

600. Cannot be required as to matter set up in answer to codefendant's answer. *Strauss v. Hanover Realty, etc., Co.*, 67 Misc. 572, 124 N. Y. Supp. 757. Where substantially all defendant claims is that it does not know whether plaintiff's claim is correct or not, a bill of particulars will not be ordered, certainly not before issue is joined. *International Import & Export Co. v. D. Monda*, 116 N. Y. Supp. 590. Applications made before pleading will be denied unless the case is exceptional, as where a bill is necessary to enable defendant to know whether to plead the statute of limitations. *Bracken v. Toland*, 153 App. Div. 57, 137 N. Y. Supp. 1043. Ordinarily not granted before answer. *Barrett Mfg. Co. v. Sergeant*, 149 App. Div. 1, 133 N. Y. Supp. 526. Defendant should not be directed to serve a bill of particulars where an order for examination of plaintiff before trial to obtain evidence to establish the defense is outstanding and unexecuted. *Weber v. Columbia Amusement Co.*, 154 App. Div. 882, 138 N. Y. Supp. 879. Where the amount of damages claimed is a mere matter of computation from items stated in the pleading, a bill of particulars should not be ordered. *Greene v. Johnson*, 126 App. Div. 23, 110 N. Y. Supp. 104; *Strohmeyer & Arpe Co. v. Hartley Silk Mfg. Co.*, 130 App. Div. 102, 114 N. Y. Supp. 287. Plaintiff will not be required to give particulars as to the sums allowed as a credit memorandum. *New York Edison Co. v. McDonald*, 54 Misc. 63, 104 N. Y. Supp. 606. Bill should be ordered to inform defendant whether contract relied on was oral or in writing. If in writing a copy should be set forth, and if oral the terms should be stated. *Cozzens v. American General Engineering Co.*, 126 App. Div. 942, 111 N. Y. Supp. 350. Where, in action on building contract, defendant counterclaims for damages from failure to complete contract, plaintiff is entitled to a bill as to damages sustained. *Kelly v. St. Michael's Roman Catholic Church*, 124 App. Div. 505, 108 N. Y. Supp. 927; *Fickinger v. Ives*, 109 App. Div.

684, 96 N. Y. Supp. 396. Particulars of the names of persons whom plaintiff procured to purchase defendant's goods, on which sales the plaintiff claims to be entitled to commissions, was held properly awarded before answer in *Zeigler v. Garvin*, 84 App. Div. 281, 82 N. Y. Supp. 769. The fact that the moving party is an executor was taken into consideration in *Oatman v. Watrous*, 99 App. Div. 254, 90 N. Y. Supp. 940. But the fact that plaintiff is an administrator is no ground for refusing defendant's motion in an action for death by wrongful act. *Bjork v. Post & McCord*, 125 App. Div. 813, 110 N. Y. Supp. 206. A motion, before answer, for a bill to enable defendant to answer will be denied where defendant denies all knowledge as to the matters alleged in the complaint. *Bailey v. Mayer*, 56 Misc. 331, 107 N. Y. Supp. 624 [citing 1 *Nichols' New York Pr.*].

863 n. 331. *International Import & Export Co. v. D. Monda*, 116 N. Y. Supp. 590; *Kavanaugh v. Commonwealth Trust Co.*, 45 Misc. 201, 91 N. Y. Supp. 967.

863 n. 332. *Kellogg v. Griffiths*, 124 App. Div. 513, 108 N. Y. Supp. 962; *New York Edison Co. v. McDonald*, 54 Misc. 63, 104 N. Y. Supp. 606; *American Transfer Co. v. George Borgfeldt & Co.*, 99 App. Div. 470, 91 N. Y. Supp. 209; *Goivans v. Jobbins*, 90 App. Div. 429, 86 N. Y. Supp. 312; *Belasco v. Klaw*, 96 App. Div. 268, 89 N. Y. Supp. 208; *Neuwelt v. Consolidated Gas Co.*, 94 App. Div. 312, 87 N. Y. Supp. 1003. But see *Bjork v. Post & McCord*, 125 App. Div. 813, 110 N. Y. Supp. 206; *Dwyer v. Slattery*, 118 App. Div. 345, 103 N. Y. Supp. 433. See also *Boland Co. v. Emma Willard School*, 76 Misc. 18, 136 N. Y. Supp. 314. But see *Wojtczak v. American, etc., Co.*, 152 App. Div. 433, 137 N. Y. Supp. 287. As in an action for an accounting, where defendant seeks the order. *United States Title Guaranty Co. v. Brown*, 160 App. Div. 591, 145 N. Y. Supp. 1014. Not required when matter of public record equally accessible to both parties. *Borgrosser v. Risch*, 149 App.



Div. 248, 133 N. Y. Supp. 683. Plaintiff cannot be required to search public records. *State Bank v. Herrmann*, 153 App. Div. 885, 137 N. Y. Supp. 995. Defendant not entitled where his answer shows that he has full knowledge. *Auerbach v. Pellman*, 125 N. Y. Supp. 782. A prior mere verbal statement made by the agent of the opposing party does not show knowledge on the part of the moving party. *Burhaus v. Hudson River Wood Pulp Mfg. Co.*, 116 App. Div. 132, 101 N. Y. Supp. 271. Where it appears that the facts are as much within the knowledge of the party demanding as they can be on the part of the party from whom the demand is made, and that the real object of the bill of particulars is to limit the party furnishing the same to the exact allegations of such bill of particulars, the appellate court will not interfere to control the discretion of the court below in denying the motion. *Messer v. Aaron*, 101 App. Div. 169, 91 N. Y. Supp. 921.

**863 n. 334.** See also *Harris v. Drucklieb*, 128 App. Div. 276, 112 N. Y. Supp. 671.

**864 n. 337.** *Posner v. Rosenberg*, 149 App. Div. 270, 133 N. Y. Supp. 702; *Nickel v. Ayer*, 141 App. Div. 576, 126 N. Y. Supp. 321; *Smidt v. Bailey*, 116 N. Y. Supp. 805; *Heilperin v. Levy*, 116 N. Y. Supp. 676; *Smith v. Anderson*, 126 App. Div. 24, 110 N. Y. Supp. 191; *Kellogg v. Griffiths*, 124 App. Div. 513, 108 N. Y. Supp. 962; *Ingraham v. International Salt Co.*, 114 App. Div. 791, 100 N. Y. Supp. 192; *Slingerland v. Corwin*, 105 App. Div. 310, 93 N. Y. Supp. 953.

**864 n. 338.** *Wilson & Baillie Mfg. Co. v. Dumary*, 140 App. Div. 838, 125 N. Y. Supp. 803; *Parke, Davis & Co. v. Rouden*, 117 N. Y. Supp. 945; *Markowitz v. Teichman*, 52 Misc. 458, 102 N. Y. Supp. 469. It is not the duty of a party to a litigation to disclose to his adversary the names of the witnesses he will call in support of his allegations, unless this is an incident to the furnishing of information in ref-

erence to an issuable fact. *Knipe v. Brooklyn Daily Eagle*, 101 App. Div. 43, 91 N. Y. Supp. 872. In an action for libel where defendant pleaded the truth of the alleged libelous statements, founded on statements of residents to a reporter of defendant, a bill of particulars containing the names and addresses of the reporter and his informants is properly denied. *Id.*

864 n. 340. *Fragner v. Fischel*, 141 App. Div. 869, 126 N. Y. Supp. 478. A bill of particulars should not be required as to the particulars of a transaction which cannot be made a matter of proof on the trial. *Strohmeyer & Arpe Co. v. Hartley Silk Mfg. Co.*, 130 App. Div. 102, 114 N. Y. Supp. 287. Where the motion is for minute and unnecessary particulars, it will be denied although a bill might be required as to some of the items. *Shepard v. Wood*, 116 App. Div. 861, 102 N. Y. Supp. 306. Surplusage. *Nickel v. Ayer*, 141 App. Div. 576, 126 N. Y. Supp. 321. Allegations as to particular misconduct are not superfluous where plaintiff is not entitled to an accounting as matter of right. *Tilton v. Gans*, 155 App. Div. 612, 140 N. Y. Supp. 782.

864 n. 342. *Heilperin v. Levy*, 116 N. Y. Supp. 676. So where answer is in effect a denial. *Wilks v. Graecen*, 120 App. Div. 311, 105 N. Y. Supp. 246; *Smith v. Anderson*, 126 App. Div. 24, 110 N. Y. Supp. 191. The same rule applies where denials of matters which plaintiff must prove are incorporated into a counterclaim of which plaintiff demands particulars. *O'Rourke v. United States Mortg. & Trust Co.*, 95 App. Div. 518, 88 N. Y. Supp. 926; *Reitmayer v. Crombie*, 94 App. Div. 303, 87 N. Y. Supp. 973. Contra, *Hopper v. Weber*, 84 App. Div. 266, 82 N. Y. Supp. 567. These cases were all actions on contract where defendants counterclaimed for damages for breach of the contract, and plaintiff sought to compel defendant to furnish the particulars as to the portions of the contract broken. So where a denial is specific, particulars will not be ordered, as where

the answer sets up certain particulars in which plaintiff failed to comply with the contract sued on. *Barretta v. Rothschild*, 93 App. Div. 211, 87 N. Y. Supp. 553. Where a recovery is sought upon the theory of a contract which has been performed, and wherein the answer denies full performance, a defendant is not required to give the particulars in which the plaintiff has failed to perform; for the reason that such knowledge is as much within the possession of the plaintiff as of the defendant, and before the former can recover it will be necessary to prove full performance. *Reitmayer v. Crombie*, 94 App. Div. 303, 87 N. Y. Supp. 973; *O'Rourke v. United States Mortg. & Trust Co.*, 95 App. Div. 518, 88 N. Y. Supp. 926. But where defendant denied performance, and alleged by way of offset, without counterclaim, that he had expended moneys for labor and materials in completing the contract, etc., such allegations being competent in support of the defense of nonperformance, plaintiff was entitled to particulars with reference thereto. *Brandt v. City of N. Y.*, 99 App. Div. 260, 90 N. Y. Supp. 929. That the answer only contains denials is no reason for refusing to compel "plaintiff" to furnish a bill of particulars. *Newman v. West*, 101 App. Div. 288, 91 N. Y. Supp. 740. Where the answer is merely a negative pregnant, defendant will not be granted a bill. *Shepard v. Wood*, 116 App. Div. 861, 102 N. Y. Supp. 306. Where, in an action to recover commissions on a contract for services, the answer denies that a contract was made, defendant is not entitled to a bill to frame an amended answer. *Sands v. Holland Torpedo Boat Co.*, 115 App. Div. 151, 100 N. Y. Supp. 684. So where answer sets up a defense as to which plaintiff has burden of proof. *Knickerbocker Trust Co. v. Miller*, 149 App. Div. 685, 133 N. Y. Supp. 989. So where matter denied is set up as a partial defense. *Hayes v. Hoyt*, 138 App. Div. 573, 123 N. Y. Supp. 357.

**865 n. 344.** In an action for fraud, unless the defendant

denies the fraud charged in the complaint, a bill of particulars of the plaintiff's claim should not be ordered. *Newman v. West*, 101 App. Div. 288, 91 N. Y. Supp. 740.

**865 § 808.** "The defendant, being a corporation which acts only through its representatives, is entitled to know the names of the persons in its employ or representing it, with whom the plaintiff's assignors claim they made the special agreement in question. (*Sittig v. Cohen*, 130 App. Div. 689.)" *Harris v. Great Eastern Casualty Co.*, 159 App. Div. 875, 144 N. Y. Supp. 950. Where contract alleged to have been made by agent, and the principal is without information as to it, the latter is entitled to particulars as to name of agent, time and place of contract, etc. *Astor Mortgage Co. v. Tenney*, 157 App. Div. 361, 142 N. Y. Supp. 265. In action by broker for commissions, defendant entitled to particulars as to contract, where he denies that he made any contract. *Astor Mortgage Co. v. Tenney*, 157 App. Div. 361, 142 N. Y. Supp. 265. In action for breach of contract of employment, see *Posner v. Rosenberg*, 149 App. Div. 270, 133 N. Y. Supp. 702. In action for breach of contract to buy goods to be manufactured, bill not required as to number of men employed. *Pomeroy Co. v. Wells Bros. Co.*, 149 App. Div. 673, 134 N. Y. Supp. 353. In an action on notes and a check of a deceased person, against an executor who denies any knowledge of the notes or check, particulars as to the real consideration thereof are properly ordered. *Miller v. Miller*, 144 App. Div. 153, 128 N. Y. Supp. 965. Is proper as to defenses and counterclaims involving many complicated transactions, in action for balance due on goods sold. *American Woolen Co. of N. Y. v. Altkrug*, 137 App. Div. 621, 122 N. Y. Supp. 394. Defendant, in action for goods and services, not required to show more particularly items admitted. *Bennett v. G. & N. Mfg. Co.*, 135 App. Div. 798, 120 N. Y. Supp. 133. In action on building contract, required as to cause of delays. *Boland*

Co. v. Emma Willard School, 76 Misc. 18, 136 N. Y. Supp. 314. May be ordered as to defense to action by servant for wrongful discharge that discharge was because of "failure to perform her duties." Macaulay v. Anthony, 66 Misc. 173, 121 N. Y. Supp. 278. Where defendant pleads waiver of strict compliance with building contract, bill is properly required as to who made the alleged waiver and its details. Hudnut Realty Co. v. Mahoney, 119 N. Y. Supp. 283. Required as to defense of adverse possession. Goldblatt v. Eiseman, Jr., 3 Current Ct. Dec. 54. In action on life policy plaintiff may be required to show how defendant had waived the provisions as to furnishing proofs of death. Cunningham v. United States Casualty Co., 125 App. Div. 916, 109 N. Y. Supp. 1014. In action against surety on bond for performance of building contract, bill may be required as to how the contractor failed to perform and the items of plaintiff's damage. Schwartzschild & Sulzberger Co. v. Empire State Surety Co., 128 App. Div. 644, 112 N. Y. Supp. 1036. In an action by a servant for an alleged wrongful discharge, a bill is properly required specifying the nature and items of the course of conduct which the answer alleges has been injurious to discipline among the employees. Burhaus v. Hudson River Wood Pulp Mfg. Co., 116 App. Div. 132, 101 N. Y. Supp. 271. In an action for breach of contract in not completing buildings as required by a contract, a bill specifying in what respects they were not completed may be ordered. Breslauer Realty Co. v. Cohen, 115 App. Div. 360, 100 N. Y. Supp. 775. One suing to recover for services in selling a business may be required to state whether the agreement was in writing, the substance thereof or a copy of the writing, and specify what services were rendered. Rhodes v. Adams, 113 App. Div. 304, 98 N. Y. Supp. 913. In action for conversion, see Farwell v. Boody, 112 App. Div. 493, 98 N. Y. Supp. 385. Landlord required to give particulars in action against tenant for wrongfully removing property.

*Chisholm v. Straus*, 110 App. Div. 552, 97 N. Y. Supp. 258. Time, place and amount of payments pleaded may be required. *Coolidge v. Stoddard*, 120 App. Div. 641, 105 N. Y. Supp. 544; *Lynch v. Dorsey*, 98 App. Div. 163, 90 N. Y. Supp. 741. See *Sittig v. Cohen*, 130 App. Div. 689, 114 N. Y. Supp. 332. Contra, *Swan v. Swan*, 44 Misc. 163, 89 N. Y. Supp. 794; *Jacob Bros. v. Kunitzer*, 116 N. Y. Supp. 677; *Heilperm v. Levy*, 116 N. Y. Supp. 667. Bills as to matters pertinent only to an accounting should not be required where no accounting can be had unless certain agreement is set aside. *Baskowitz v. Sulzbacher*, 124 App. Div. 682, 109 N. Y. Supp. 186. Action to recover damages for breach of contract of hire by agent, bill allowed as to wherein plaintiff failed to comply with the contract. *Sundheimer v. James S. Bannon & Co.*, 62 Misc. 263, 114 N. Y. Supp. 804. In action for damages for refusal to reassign copyrights, bill granted as to nature and items of damages. *Shaw v. Stone*, 124 App. Div. 624, 109 N. Y. Supp. 146. Allowed in quo warranto proceedings. *People v. McClellan*, 191 N. Y. 341, 84 N. E. 68. Allowed in action to recover for attorney's services. *Aub v. Hoffman*, 120 App. Div. 50, 104 N. Y. Supp. 913. In action to charge defendants, members of a voluntary association, with liability for services of a sculptor, see *Ward v. Hodges*, 130 App. Div. 869, 115 N. Y. Supp. 899.

**865** n. 345. Particulars of counterclaim required where real estate agent charged with making personal profit. *Washburn v. Graves*, 117 App. Div. 343, 101 N. Y. Supp. 1043.

**865** n. 348. But see *Spitz v. Heinze*, 77 App. Div. 317, 79 N. Y. Supp. 187.

**866**. Under a general denial, defendant is entitled to a bill setting out the contract with defendant and the items of special damages. *United States Paper Co. v. De Haven*, 115 App. Div. 403, 100 N. Y. Supp. 796. Bill held prop-

erly ordered in action to recover damages for injuries to personal property sustained by the plaintiff in consequence of the negligent manner in which the defendant maintained and repaired the roof of certain premises, of which the defendant was the lessor and the plaintiff the lessee. *M. J. Taylor & Co. v. Asiel*, 93 N. Y. Supp. 377. Bill refused as to names and addresses of dealers whose trade in plaintiff's goods was lost by defendant's contract for exclusive sale of particular goods. *Armstrong v. Heide*, 45 Misc. 344, 90 N. Y. Supp. 372. In *Treadwell v. Greene*, 87 App. Div. 289, 84 N. Y. Supp. 354, which was an action to recover for services, a bill was ordered as to whether certain contracts were oral or written, their date, and whether made personally by defendant or through an agent. Bill of particulars as to exemplary damages will not be awarded. *Korber v. Dime Savings Bank*, 134 App. Div. 149, 118 N. Y. Supp. 857. As to breach of warranty, in action on burglar insurance policy, see *Vanta v. Massachusetts Bonding & Ins. Co.*, 158 App. Div. 502, 143 N. Y. Supp. 705.

866 n. 352. Action by architects for services, see *Radcliffe v. N. Y. Cab Co., Ltd.*, 134 App. Div. 450, 119 N. Y. Supp. 251.

866 n. 354. See *Herzig v. Washington Fire Ins. Co.*, 143 App. Div. 386, 128 N. Y. Supp. 565.

866 n. 357. *Gross v. Conner*, 114 App. Div. 32, 99 N. Y. Supp. 569.

866 n. 358. *Huber Brewery v. Sieke*, 146 App. Div. 467, 131 N. Y. Supp. 271; *Radcliffe v. N. Y. Cab Co., Ltd.*, 134 App. Div. 450, 119 N. Y. Supp. 251; *Breslauer Realty Co. v. Cohen*, 115 App. Div. 360, 100 N. Y. Supp. 775. But where most of the damages are special, a bill is properly ordered. *McIntosh v. Pullman Co.*, 53 Misc. 286, 103 N. Y. Supp. 223.

867. A bill may be ordered in an action for assault and battery as to time and circumstances but not as to injuries sustained where there is no allegation of permanent in-

juries. *Ferris v. Brooklyn Heights R. Co.*, 116 App. Div. 892, 102 N. Y. Supp. 463. Defendant is entitled to a bill showing the items of damage in a suit for damages to personal property and for injury to the freehold. *Weinstein v. O'Leary*, 128 App. Div. 267, 112 N. Y. Supp. 641.

867 n. 359. *Loscher v. Hager*, 124 App. Div. 568, 109 N. Y. Supp. 562.

867 n. 360. In *Griffin v. Cunard Steamship Company*, 159 App. Div. 453, 144 N. Y. Supp. 517, the Supreme Court in the first department, denying plaintiff's application for a bill of particulars of contributory negligence, says: "Upon considerations of sound public policy we have not allowed general examinations before trial in negligence cases. (*Wood v. Hoffman Co.*, 121 App. Div. 636.) It seems apparent that if an order should require the defendant to give the particulars of the claimed contributory negligence *the court must be prepared to grant an application for an order for plaintiff's examination before trial* to enable defendant to comply with the order for particulars. *We are unwilling to embark on this course of procedure.*" On the same day, the Appellate Division, second department, in *Havholm v. Whale Creek Iron Works*, 159 App. Div. 578, 144 N. Y. Supp. 833, held, in direct conflict with the first department, that a bill of particulars of the defense of contributory negligence in an employee's action may be required of defendant, where the burden of proof in regard thereto is, by statute, on him. The latter case is followed in *Szymanski v. Contact Process Co.*, 82 Misc. 46, 143 N. Y. Supp. 604. Caution necessary in requiring. *Shea v. Spellman*, 3 Current Ct. Dec. 101. Bill ordered as to how accident occurred. *Kaplan v. Sher*, 109 N. Y. Supp. 20. In an action for personal injuries it is no answer to the application that the party making the claim is an executor or administrator and therefore has no personal knowledge. *Waller v. Degnon Contracting Co.*, 120 App. Div. 389, 105 N. Y. Supp. 203;



Heslin v. Lake Champlain & Moriah R. Co., 109 App. Div. 814, 96 N. Y. Supp. 761.

867 n. 361. Wojtczak v. American, etc., Co., 152 App. Div. 433, 137 N. Y. Supp. 287; Clum v. Federal Sugar Refining Co., 136 App. Div. 355, 120 N. Y. Supp. 975; Nellis v. Brown-Leipe Gear Co., 128 N. Y. Supp. 756; Kaplan v. Sher, 56 Misc. 432, 106 N. Y. Supp. 1094; Dwyer v. Slattery, 118 App. Div. 345, 103 N. Y. Supp. 433. Bill may be required in action by servant against master; where failure to furnish safe tools is pleaded, as to what tools the allegations relate to. Hoarean v. Schwartzkopff, 142 App. Div. 69, 126 N. Y. Supp. 448.

867 n. 362. Higgins v. Erie R. R. Co., 140 App. Div. 222, 124 N. Y. Supp. 1082; Waller v. Degnon Contracting Co., 120 App. Div. 389, 105 N. Y. Supp. 203; Heslin v. Lake Champlain & M. R. Co., 109 App. Div. 814, 96 N. Y. Supp. 761 (holding, in addition that it is immaterial that plaintiff is an administratrix); Causullo v. Lenox Const. Co., 106 App. Div. 575, 94 N. Y. Supp. 639. But see Hill v. Bloomingdale, 136 App. Div. 651, 121 N. Y. Supp. 370. Dangerous condition of stairway. Robinson v. Stewart, 84 App. Div. 594, 82 N. Y. Supp. 928. Defective condition of window. Burke v. Frenkel, 95 App. Div. 89, 88 N. Y. Supp. 517. But in Neuwelt v. Consolidated Gas Co., 94 App. Div. 312, 87 N. Y. Supp. 1003, it was held improper to require plaintiff to furnish a bill of particulars specifying the particular act or acts of negligence on the part of defendant gas company which the plaintiff claimed had caused the explosion.

867 n. 363. Kist v. R. M. Haan & Co., 111 N. Y. Supp. 59; Biehayn v. New York City R. Co., 123 App. Div. 652, 108 N. Y. Supp. 66 (holding physical examination does not serve the purpose of a bill of particulars); O'Neill v. Interurban St. R. Co., 87 App. Div. 557, 84 N. Y. Supp. 505. But not other injuries. Renz v. Lugt, 147 App. Div. 638,

132 N. Y. Supp. 522. Particulars as to medical expense may be ordered as to the time lost by plaintiff and the wages which he was prevented from earning. *Ziadi v. Interurban St. R. Co.*, 97 App. Div. 137, 89 N. Y. Supp. 606. But particulars of injuries not permanent cannot be required. *Lachenbruch v. Cushman*, 87 N. Y. Supp. 476. Nature, location and extent of injuries. *Greene v. Johnson*, 126 App. Div. 33, 110 N. Y. Supp. 104.

868 n. 364. *Loscher v. Hager*, 124 App. Div. 568, 109 N. Y. Supp. 562. A bill as to general damages will not be ordered. *Town Topics Pub. Co. v. Collier*, 114 App. Div. 191, 99 N. Y. Supp. 575. When no special damages are alleged, a bill as to elements of damages should not be granted. *Hanson Co. v. Collier*, 51 Misc. 496, 101 N. Y. Supp. 690. Names of defendant's witnesses will not be required. *Knipe v. Brooklyn Daily Eagle*, 101 App. Div. 43, 91 N. Y. Supp. 872.

868 n. 365. Bill refused as unnecessary. *Reader v. Haggin*, 123 App. Div. 489, 107 N. Y. Supp. 963. Defendant entitled to bill as to persons in whose presence slander uttered, as pleaded, and names of persons alleged in complaint to have refused to deal with plaintiff. *Kayata v. Ontra*, 159 App. Div. 511, 144 N. Y. Supp. 475.

868 n. 366. *Smith v. Bradstreet Co.*, 134 App. Div. 567, 119 N. Y. Supp. 487 (as to special damages). Plaintiff not entitled to bill as to want of probable cause and malice, where specifically denied, although probable cause and want of malice are also set up as a partial defense. *Hayes v. Hoyt*, 138 App. Div. 573, 123 N. Y. Supp. 357.

868 n. 370. As to terms of agreement of warehouse company not to sell goods for default in payment. *Taylor v. Metropolitan Fireproof Storage, etc., Co.*, 140 App. Div. 321, 125 N. Y. Supp. 137. Where plaintiff claims only the value, defendant is not entitled to particulars of damages. *Kalina v. American Label Co.*, 146 App. Div. 718, 131 N. Y. Supp. 410.

869 n. 371. The names of the "duly authorized agent or agents" of the plaintiff to whom fraudulent statements were made, and the names of the officers of a corporation alleged to have conspired against plaintiff, may be obtained by an individual defendant. *Riker v. Erlanger*, 87 App. Div. 137, 84 N. Y. Supp. 69. See also *Knickerbocker Trust Co. v. Packard*, 109 App. Div. 421, 96 N. Y. Supp. 412.

869 n. 372. In the absence of any special reasons therefor, a bill was refused in a judgment creditor's action where plaintiff sought to compel defendant to set forth the services rendered which were claimed to constitute the consideration for the conveyance. *Allter v. Jerome*, 110 App. Div. 813, 97 N. Y. Supp. 243. If the defendant has been guilty of a fraud, it does not need, in order to properly defend the action, to be informed, in advance of the trial, what information the plaintiff has on that subject. It is not the office of a bill of particulars to inform an adversary, in advance of the trial, upon what his opponent relies. *American Thresher Co. v. George Borgfeldt & Co.*, 99 App. Div. 470, 91 N. Y. Supp. 209.

869 n. 374. *Slingerland v. Corwin*, 105 App. Div. 310, 93 N. Y. Supp. 953. As to fraud and undue influence in obtaining deed. *Jones v. McDonough*, 143 App. Div. 178, 127 N. Y. Supp. 695.

869 n. 377. As to defense that plaintiff intrusted the property to a third person and clothed him with apparent title. *Adams v. Coe*, 65 Misc. 517, 119 N. Y. Supp. 1086.

870 n. 378. *Furthmann v. Furthmann*, 155 App. Div. 202, 139 N. Y. Supp. 1055; *Weis v. Weis*, 123 App. Div. 409, 107 N. Y. Supp. 1061; *Kirkland v. Kirkland*, 39 Misc. 423, 80 N. Y. Supp. 21. In divorce suit for adultery, bill of particulars as to place and time will not be ordered after the issues have been framed. *Stein v. Stein*, 116 N. Y. Supp. 93.

**870 n. 379.** *Lundberg v. DeRonde*, 146 App. Div. 1, 130 N. Y. Supp. 385. As to defense, see *Bluthenthal & Bickart, Inc., v. Crowley*, No. 1, 138 App. Div. 843, 123 N. Y. Supp. 519.

**870 § 809.** Where the application is made after answer, it seems that an affidavit of merits is not necessary. *Worden v. New York City R. Co.*, 48 Misc. 626, 96 N. Y. Supp. 180. While the usual practice is to serve a demand for a bill of particulars to obtain costs of the motion if the demand is not complied with, yet it seems that a formal demand is not necessary for that purpose, since it is held in *Main v. Pender*, 88 App. Div. 237, 85 N. Y. Supp. 428, that such a demand will be stricken out on motion inasmuch as a party can demand, as a right, only a copy of the items alleged in an account. Demand of bill "of defendant's claim" is broad enough to cover both defenses and counterclaims. *Posner v. Rosenberg*, 149 App. Div. 270, 133 N. Y. Supp. 702.

**870 n. 381.** The 1904 amendment of section 531 of the Code expressly requires notice of the motion. It changes the former practice by permitting the application to be made to the court "or to a judge authorized to make an order in the action." Order is necessary before party can be precluded from giving evidence. *Hein v. Honduras Syndicate*, 138 App. Div. 786, 123 N. Y. Supp. 431.

**871.** Should be denied as to particulars specified in the notice of motion but not in a previous demand for a bill. *White v. Kaliski*, 109 N. Y. Supp. 716. If a bill is served before a motion is made to compel the delivery of a bill, and it is retained, the motion should be for a further bill. *Schlesinger v. Thalmessinger*, 93 N. Y. Supp. 381.

**871 n. 382.** The contrary is held in two late cases. See **1064 n. 23.**

**871 n. 385.** *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 112 App. Div. 775, 98 N. Y. Supp. 572; *Kirkland v. Kirkland*, 39 Misc. 423, 80 N. Y. Supp. 21.

**871** n. 386. See also *Canonico v. Cunard Steamship Co.*, 49 Misc. 92, 96 N. Y. Supp. 499. Stating want of knowledge by the attorney and also of his client "as I verily believe" is not sufficient. *Casassa v. A. Cuneo Co.*, 115 N. Y. Supp. 124.

**871** n. 387. *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 112 App. Div. 775, 98 N. Y. Supp. 572.

**871** n. 389. *Toomey v. Whitney* is officially reported in 81 App. Div. 441.

**872** n. 391. *Mutual Life Ins. Co. v. Grannis*, 118 App. Div. 830, 103 N. Y. Supp. 835. And see *Ehrich v. Deszar*, 130 App. Div. 110, 114 N. Y. Supp. 271. A motion by defendant before answer will be denied. *Standard Materials Co. v. Bowne & Son Co.*, 118 App. Div. 91, 103 N. Y. Supp. 12. It would seem that where defendant has not sufficient knowledge to either admit or deny allegations of the complaint, it is necessary to answer by denying any knowledge or information sufficient to form a belief before moving for a bill of particulars (*American Credit Indem. Co. v. Bondy*, 17 App. Div. 328, 45 N. Y. Supp. 267; followed in *Hicks v. Eggleston*, 95 App. Div. 162, 88 N. Y. Supp. 528), but it is submitted that these cases are not sufficiently broad to prevent, in every other case, the granting of a bill of particulars before the party serves his pleading, i. e., before defendant serves his answer if he is the moving party, or before plaintiff serves his reply if he is the moving party. In other words, the order, where made before the moving party pleads, cannot be sustained on the ground that it is necessary to prepare for trial. *Hicks v. Eggleston*, 95 App. Div. 162, 88 N. Y. Supp. 528. Where "the defendant has, in his moving papers, sworn to merits, a bill of particulars is unnecessary in order to enable him to plead. 1 Nichols' Pr. 863, and cases there cited." *Kavanaugh v. Commonwealth Trust Co.*, 45 Misc. 201, 91 N. Y. Supp. 967. No bill of particulars concerning a counter-

claim, to prepare for trial, will be ordered until a reply has been served. *Fidelity Glass Co. v. Thatcher Mfg. Co.*, 88 App. Div. 287, 85 N. Y. Supp. 8. "In *American Credit Indemnity Co. v. Bondy*, 17 App. Div. 328, 45 N. Y. Supp. 267, it was held by the Appellate Division, in the first department, that, where no answer has been served, a motion by the defendant for a bill of particulars upon the ground that it was necessary for his defense, must be denied, as it cannot be said that a defense will be made until an issue is raised by the service of an answer; and it was further held that such an order could not be granted to enable the defendant to answer where he was wholly ignorant of the particulars of the plaintiff's claim, inasmuch as the Code of Civil Procedure (section 500) permits him to deny any knowledge or information sufficient to form a belief as to the allegations of the complaint in reference to it. That case was followed by this court on both points in *Hicks v. Eggles-ton*, 95 App. Div. 162, 88 N. Y. Supp. 528, and must be assumed to state the rule applicable to the situation in this department." *Schultz v. Rubsam*, 93 N. Y. Supp. 334. Before reply. *Paul v. Nahl*, 119 App. Div. 880, 104 N. Y. Supp. 233. Where no reply has been served to a counterclaim. *Chantrell Hardware & Tool Co. v. Silberman*, 141 N. Y. Supp. 317.

872 n. 393. *Lundberg v. DeRonde*, 146 App. Div. 1, 130 N. Y. Supp. 385; *Gowans v. Jobbins*, 90 App. Div. 429, 432, 86 N. Y. Supp. 312. Compare *Levittas v. Hart*, 116 N. Y. Supp. 636.

873 n. 397. *Florsheim v. Musical Courier Co.*, 103 App. Div. 388, 93 N. Y. Supp. 41.

873 n. 398. *Tilton v. Gans*, 155 App. Div. 612, 140 N. Y. Supp. 782.

873 n. 399. *Convery v. Marrin*, 128 App. Div. 265, 112 N. Y. Supp. 673.

874. If verified pleadings are a part of the moving papers,

denials therein are to be treated as if in the moving affidavit. *Newman v. West*, 101 App. Div. 288, 91 N. Y. Supp. 740.

**874** n. 408. *Knox v. Knox*, 79 Misc. 648, 140 N. Y. Supp. 356; *Toomey v. Whitney* is officially reported in 81 App. Div. 441. Affidavit of plaintiff's ignorance as to matters specified in demand should be made by him rather than by his attorney. *Strohoefer v. Security Mut., etc., Co.*, 148 App. Div. 763, 133 N. Y. Supp. 289.

**874** n. 411. Bare allegation of lack of knowledge is ordinarily not a sufficient answer. *Ditollo v. Erie R. Co.*, 126 App. Div. 811, 111 N. Y. Supp. 125.

**875** n. 412. *Ziadi v. Interurban St. R. Co.*, 97 App. Div. 137, 89 N. Y. Supp. 606.

**875**. Form of affidavit. Propriety of motion before pleading, see ante, **872** n. 391.

**875** § 810. That demand for bill was too broad is no ground for refusing. *Mayer v. Commonwealth Trust Co.*, 124 App. Div. 932, 109 N. Y. Supp. 27. Whether plaintiff should serve a bill is to be determined from the complaint and not from defendant's bill of particulars of a counterclaim. *Fickinger v. Ives*, 109 App. Div. 684, 96 N. Y. Supp. 396.

**876** n. 418. *Earle v. Earle*, 79 App. Div. 631 (mem.), 79 N. Y. Supp. 613.

**876** n. 419. If inspection of books of opposing party is necessary to furnish bill, time therefor should be permitted. *Dougherty v. Southern Packing Co.*, 139 N. Y. Supp. 1100.

**876** § 811. If order directs payment of costs of motion before date of service of bill, the right to serve the bill is not conditional on payment of such costs. *Galif v. Erlichman*, 71 Misc. 434, 128 N. Y. Supp. 628. Plaintiff should be required to specify defects in ways, works, machinery, etc., only so far as within his knowledge or information. *Emmi v. Ryan-Parker Constr. Co.*, 134 App. Div. 482, 119 N. Y. Supp. 267. Order should not be resettled after lapse of

months by incorporating a stay of proceedings. *Prym v. Peck & Mack Co.*, 136 App. Div. 566, 121 N. Y. Supp. 57. Bill served after motion but before order is not a compliance with the order. *Hosner v. Keahon*, 116 N. Y. Supp. 720. The granting of a bill should not be conditioned on a waiver of a right to a physical examination. *Baker v. New York City R. Co.*, 116 App. Div. 858, 102 N. Y. Supp. 276. The order may provide "that in case the plaintiff has no knowledge with reference to any of the foregoing particulars, she shall state such lack of knowledge under oath in lieu thereof." *Worden v. New York City R. Co.*, 48 Misc. 626, 96 N. Y. Supp. 180.

876 n. 422. *Contra*, *Borggrosser v. Risch*, 149 App. Div. 248, 133 N. Y. Supp. 683. *Contra*, that order should under no circumstances contain a stay of "all" proceedings. *Prym v. Peck & Mack Co.*, 136 App. Div. 566, 121 N. Y. Supp. 57.

876 n. 423. *Contra*, *Prym v. Peck & Mack Co.*, 136 App. Div. 566, 121 N. Y. Supp. 57.

876 n. 424. *Oatman v. Watrous*, 99 App. Div. 254, 90 N. Y. Supp. 940; *D'Anglemont v. Fischer*, 87 N. Y. Supp. 505. The later cases, however, hold that such a provision in the order is improper as premature. *Loscher v. Hager*, 124 App. Div. 568, 109 N. Y. Supp. 562; *Foster v. Curtis*, 121 App. Div. 689, 106 N. Y. Supp. 388; *Posner v. Rosenberg*, 149 App. Div. 270, 133 N. Y. Supp. 702. Orders too broad where covering matters not related to the bill of particulars. *Pomeroy Co. v. Wells Bros. Co.*, 149 App. Div. 673, 134 N. Y. Supp. 353.

877. The order should not require the annexation of documentary evidence. *Pruyn v. Ecuadorian Ass'n*, 94 App. Div. 195, 87 N. Y. Supp. 970. An order allowing particulars to be served after a default should not provide for a production of books and papers. *Romer v. Kensico Cemetery*, 79 App. Div. 100, 80 N. Y. Supp. 38.

878 n. 432. See *Kindberg v. Chapman*, 115 App. Div.



153, 100 N. Y. Supp. 685; *Maloney v. United Dressed Beef Co. of New York*, 130 App. Div. 369, 114 N. Y. Supp. 927. Sufficiency of bill furnished by attorney in action by him for services, see *Squires v. Kissam*, 121 App. Div. 607, 106 N. Y. Supp. 373. Sufficiency of bill where bill required of defendant in action by architect to recover for services, see *Berg v. Griffith*, 153 App. Div. 806, 138 N. Y. Supp. 924.

**879 § 813.** Where bill alleged certain agreements to be partly oral and partly in writing, plaintiff was required to furnish copies of the written agreement. *Fischel v. Fischel*, 121 App. Div. 868, 106 N. Y. Supp. 815. Court has power to excuse a party required to furnish the particulars, from doing so in so far as impossible, on motion for a further bill. *Chartered Bank of India v. Nassau Fire Ins. Co.*, 145 App. Div. 307, 129 N. Y. Supp. 1067.

**879 n. 445.** *Smith v. Bradstreet Co.*, 134 App. Div. 567, 119 N. Y. Supp. 487. Compare *Boskowitz v. Sulzbacher*, 128 App. Div. 537, 112 N. Y. Supp. 890. Such procedure is a prerequisite to an order precluding the party from giving evidence in regard thereto. *Reader v. Haggin*, 114 App. Div. 112, 99 N. Y. Supp. 681; *Pollack v. Wiener*, 107 N. Y. Supp. 405. Where the bill is insufficient, it may be returned with a notice of the reason therefor, so as to put the burden of making a motion to test its sufficiency on the party furnishing the bill. The party served with the bill has his choice to return the bill furnished or to demand a further bill. *Faller v. Ranger*, 44 Misc. 424, 90 N. Y. Supp. 55. In this case, the court discusses the practice as follows: "If the bill of particulars is returned, then the party serving it, taking the risk of its sufficiency, may do nothing, and wait until the question is raised upon the trial. This risk, however, we do not think he should be bound to assume, or that it is good practice to assume it, because it will necessarily place him at a disadvantage in having to go to trial, assuming the risk that the bill of particulars, as served, complied with

the order; the defendant, on the other hand, assuming no risk by returning it, even if it does comply. \* \* \* If the bill as served is deemed defective or insufficient, the one on whom it is served can move for a further bill of particulars, and this is seemingly the more regular and orderly practice. Should he, however, elect to return it, then the party serving it should have the right to compel him to accept it, and on such a motion the question of whether or not it complies with the order should be decided. In either of these events the question is determined in advance of the trial, and such practice commends itself, because it tends to avoid delay and confusion at the outset of a trial, and saves the trial judge from being bothered by questions of practice and sufficiency of bills of particulars at a time when he is ready to take up and dispose of the controversy on its merits." *Faller v. Ranger*, 99 App. Div. 374, 91 N. Y. Supp. 205.

**879** n. 449. See *Herrmann v. Empire, etc., Co.*, 152 App. Div. 822, 137 N. Y. Supp. 809; *New York County Nat. Bank v. Herrman*, 148 App. Div. 631, 133 N. Y. Supp. 200; *Schepps v. Japanese Fan Co.*, 145 App. Div. 418, 421, 131 N. Y. Supp. 1015, 1017; *Whitmore v. Jungman*, 129 N. Y. Supp. 776. Sufficiency of counter affidavits, see *Connolly v. Wills, Inc.*, 140 App. Div. 303, 125 N. Y. Supp. 189.

**880** n. 451. On failure to comply with order, where time to appeal has expired, motion to preclude giving evidence as to matters in question is proper; but the opposing party may move to modify the order for a further bill although the time to appeal has expired. *Cossman v. Ballin*, 141 App. Div. 68, 125 N. Y. Supp. 647.

**880** § 814. See *Osborn v. McArthur Bros. Co.*, 132 App. Div. 845, 117 N. Y. Supp. 750. Under present practice order granting bill should not contain penalty for disobedience. See *supra*, **876** n. 424. Sufficiency of bill, as limiting the evidence, should be determined on motion before trial,

if questioned. *Smith v. Bradstreet Co.*, 134 App. Div. 567, 119 N. Y. Supp. 487.

880 n. 452. Application should be made for order limiting the proof as to the matters involved. *Hein v. Honduras Syndicate*, 138 App. Div. 786, 123 N. Y. Supp. 431. Precluding giving evidence improper where order complied with. *Beck v. Tynberg*, 153 App. Div. 881, 137 N. Y. Supp. 1073. Should be precluded from giving evidence where party has deliberately and intentionally failed to comply with order. *Witschieben v. Glynn*, 156 App. Div. 193, 140 N. Y. Supp. 1037. Should not be precluded from giving evidence as to matters which it is shown he is unable to give particulars; but there should be itemized and sworn showing as to such matters. *Furthmann v. Furthmann*, 155 App. Div. 202, 139 N. Y. Supp. 1055. If motion made to preclude giving of evidence, opposing party should move to have his default opened. *Craig v. Roach*, 139 N. Y. Supp. 317.

880 § 815. Cannot supply necessary allegations omitted in complaint. *Lewis v. City Realty Co.*, 158 App. Div. 733, 143 N. Y. Supp. 1026. Cannot strengthen complaint on demurrer for insufficiency. *Kaufman v. Hopper*, 151 App. Div. 28, 135 N. Y. Supp. 363.

880 n. 455. Defective averments in the answer, as to fraud, cannot be aided by statements in the bill of particulars. The rule is that a bill of particulars cannot be resorted to to enlarge the grounds of recovery, to change the cause of action, or to enlarge the defense set up in the answer. *Beadleston & Woerz v. Furrer*, 102 App. Div. 544, 92 N. Y. Supp. 879. The bill cannot change the cause of action. *Dixon v. Bunnell*, 52 Misc. 560, 102 N. Y. Supp. 775.

880 n. 456. *Lester v. Clarke*, 40 Misc. 688, 83 N. Y. Supp. 168.

881 n. 458. See also *Dunne v. Robinson*, 53 Misc. 545, 103 N. Y. Supp. 878.

881 § 816. Failure to serve summons and complaint

within the required time is not fatal on defendant's motion for judgment, since the motion may be denied on condition that the complaint be served within a specified time. *McMasters v. Allcutt*, 151 App. Div. 559, 136 N. Y. Supp. 144. If complaint promptly returned because not verified, leave to serve a complaint after inexcusable delay of five years should not be granted. *Burns v. Meister*, 141 App. Div. 674, 125 N. Y. Supp. 916.

881 n. 463. Failure to demand a copy of the complaint within twenty days precludes a subsequent motion to require plaintiff's attorney to serve a copy. The practice is to apply to the court to open the default and be permitted to serve a demand. *Stokes v. Schildknecht*, 85 App. Div. 602, 83 N. Y. Supp. 358.

882. Service of the complaint should not be required after defendant's time to answer has expired, where no special circumstances are shown. *Shenstone v. Wilson*, 117 App. Div. 752. Service of complaint will be set aside where no summons was served. *Korona v. Piknik*, 58 Misc. 315, 110 N. Y. Supp. 867.

882 n. 468. *Kinley v. American Hardware Mfg. Co.*, 49 Misc. 334, 99 N. Y. Supp. 199.

882 n. 475. Opposing party, for purposes of motion, may rely on correctness of copy served. *Felix v. Josephthal*, 76 Misc. 267, 134 N. Y. Supp. 923. Interlineation in the original, not in the copy served, is to be disregarded. *Guarino v. Firemen's Ins. Co.*, 44 Misc. 218, 88 N. Y. Supp. 1044.

883 § 817. The service is in time if made twenty days before the adjourned day fixed for trial. *Muller v. Philadelphia*, 114 App. Div. 138, 99 N. Y. Supp. 618. Where a defendant has served his answer upon codefendants, and no notice of trial has been served upon him, the codefendants cannot have the action dismissed and thereby prevent him from having his rights determined. *Hinkle v. Sullivan*, 108 App. Div. 316, 95 N. Y. Supp. 788.

**883** n. 482. *O'Neill v. Franklin Fire Ins. Co.*, 159 App. Div. 313, 145 N. Y. Supp. 432. Such an answer should not be stricken out. *New York v. Montague No. 1*, 149 App. Div. 475, 134 N. Y. Supp. 87, rev. 74 Misc. 521, 134 N. Y. Supp. 520. A defendant who does not so serve his answer cannot avail himself of his codefendant's answer so served. *Knickerbocker Trust Co. v. Oneonta, C. & R. S. Co.*, 116 App. Div. 78, 101 N. Y. Supp. 241.

**884** n. 485. *Belden v. Brown*, 77 Misc. 282, 136 N. Y. Supp. 287.

**884** n. 487. Nor is it permissible. *Strauss v. Hanover Realty, etc., Co.*, 67 Misc. 572, 124 N. Y. Supp. 757. But answer is not deemed controverted under § 522 of the Code. *Mellen v. Athens Hotel Co.*, 149 App. Div. 534, 133 N. Y. Supp. 1079.

**885** § 819. Withdrawal of demurrer, see post, **1013** n. 173. After a case has been set down for trial, it is proper to refuse to allow a demurrer to be substituted for the answer where the question sought to be raised by the demurrer can be presented under the answer. *Le Brantz v. Campbell*, 89 App. Div. 583, 85 N. Y. Supp. 654. After a reversal, on appeal, of an order striking certain allegations from the complaint, defendants should be granted leave to withdraw his answer. *Brown v. Fish*, 40 Misc. 573, 82 N. Y. Supp. 939.

**887**. Where the amended complaint is not verified, although the original was verified, defendant may serve an unverified answer. *Brooks Bros. v. Tiffany*, 117 App. Div. 470, 102 N. Y. Supp. 626.

**887** nn. 503-505. By Laws 1904, c. 518, which amended section 1680 of the Code, the complaint must be verified to enable plaintiff to file a *lis pendens*.

**888** n. 517. Rule applied where complaint charged defendants with a misdemeanor. *Thompson v. McLaughlin*, 138 App. Div. 711, 123 N. Y. Supp. 762.

**889** n. 523. The amendment of this provision in 1911

adds to the section the following clause: "except that an answer containing a counterclaim, which charges adultery must be verified in respect of such counterclaim, where the complaint is verified."

890 n. 533. Where answer is interposed by four defendants, one of them acquainted with the facts may verify it. *Mathis v. Ballard*, 73 Misc. 274, 130 N. Y. Supp. 873.

891 n. 542. The liquidation committee of a corporation are officers. *Wills v. Rowland & Co.*, 117 App. Div. 122, 102 N. Y. Supp. 386.

891 n. 545. *Eastham v. New York State Tel. Co.*, 86 App. Div. 562, 83 N. Y. Supp. 1019.

892 n. 552. It is not enough that plaintiff does not "reside" within the county. *Boyce v. Dumars*, 114 App. Div. 284, 99 N. Y. Supp. 769.

896 n. 583. *Connolly v. Schroeder*, 121 App. Div. 634, 106 N. Y. Supp. 303.

896 n. 585. *Henry v. Brooklyn Heights R. Co.*, 43 Misc. 589, 89 N. Y. Supp. 525.

896 n. 587. A statement of the "grounds of belief" which the verification is to include, when made by a person other than the party, must necessarily be such as would show some actual connection between the information acted upon and the issues to which the verification is directed. *Nelson v. Bamch*, 60 Misc. 357, 113 N. Y. Supp. 449. Of course, if the answer denies knowledge or information sufficient to form a belief, the attorney may verify it without setting forth the grounds of his belief. *American Audit Co. v. Industrial Federation*, 84 App. Div. 304, 82 N. Y. Supp. 642.

899 n. 597. *Morris v. Fowler*, 99 App. Div. 245, 90 N. Y. Supp. 918.

901 n. 619. Defect must be specifically pointed out. *Rosenthal v. Cohn*, 55 Misc. 533, 105 N. Y. Supp. 943.

901 n. 622. *Rosenthal v. Cohn*, 55 Misc. 533, 105 N. Y. Supp. 943.

901 n. 627. When pleading is returned in twenty-four hours, see *Sweeney v. O'Dwyer*, 45 Misc. 43, 90 N. Y. Supp. 806.

902 § 826. The pleadings will be strictly construed in an action to recover a penalty. *Ithaca Fire Dept. v. Rice*, 108 App. Div. 100, 95 N. Y. Supp. 464; *People v. Redding*, 70 Misc. 420, 126 N. Y. Supp. 977.

903. Form not material where intent is clear. *Smith v. Metropolitan L. Ins. Co.*, 79 Misc. 550, 140 N. Y. Supp. 327. Where complaint tries to avoid defense of statute of limitations by resort to duplicity, it is not, on demurrer, entitled to a liberal construction. *McCluskey v. Wile*, 144 App. Div. 470, 129 N. Y. Supp. 455. Alleging a person claims a thing to be so is not equivalent to alleging that it is so. *Barkenthin v. People*, 155 App. Div. 285, 140 N. Y. Supp. 100 [aff. 136 N. Y. Supp. 178].

904 n. 637. *Clark v. West*, 193 N. Y. 349, 86 N. E. 1 [reversing on other grounds 110 N. Y. Supp. 110].

906 n. 652. *Williamson v. Wager*, 90 App. Div. 186, 86 N. Y. Supp. 684. But see *Jones v. McNally*, 53 Misc. 59, 103 N. Y. Supp. 1011 (where the rule is criticized as illogical and absurd).

906 n. 655. *Eppley v. Kennedy*, 198 N. Y. 348, 91 N. E. 797. See also *Catterson v. Brooklyn Heights R. Co.*, 116 N. Y. Supp. 760. A complaint is to be liberally construed in favor of the pleader. This is especially true where its sufficiency is attacked for the first time upon the trial, and after a former trial upon the merits without objection to its sufficiency. *Wright v. United Traction Co.*, 131 App. Div. 356, 115 N. Y. Supp. 630.

908 n. 668. *Jones v. Gould*, 123 App. Div. 236, 108 N. Y. Supp. 31.

908 § 836. "When an instrument sued upon is annexed to

and made part of a complaint, any facts recited in such instrument are to be considered as alleged in the pleading. *Spence v. Woods*, 134 App. Div. 182, 118 N. Y. Supp. 807, 808.

908 n. 669. *Kienle v. Fred Gretsche Realty Co.*, 133 App. Div. 391, 117 N. Y. Supp. 500; *Goldstein v. Michelson*, 45 Misc. 601, 91 N. Y. Supp. 33.

908 n. 671. *Curran v. Arp*, No. 1, 141 App. Div. 38, 125 N. Y. Supp. 758.

910. Admission by failure to deny. *Walsh v. Barrett*, 154 App. Div. 461, 139 N. Y. Supp. 68. Extent of admission, see *Lautman v. New York*, 157 App. Div. 219, 141 N. Y. Supp. 1042.

910 n. 676. *Devoe v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339; *Reiss v. Pfeiffer*, 117 App. Div. 880, 103 N. Y. Supp. 478; *Driscoll v. Brooklyn Union El. R. Co.*, 95 App. Div. 146, 88 N. Y. Supp. 745; *Fiebiger v. Forbes*, 43 Misc. 612, 88 N. Y. Supp. 284. See *Sturgis v. Fifth Ave. Coach Co.*, 122 App. Div. 658, 107 N. Y. Supp. 270.

910 n. 677. See *Overland Sales Co. v. Kaufman*, 76 Misc. 230, 134 N. Y. Supp. 599.

912 § 841. Where plaintiff in his complaint admits a credit but the answer denies the allegations of the complaint, the admission is not conclusive. *Oneida Steel Pulley Co. v. New York Leather Belting Co.*, 120 App. Div. 625, 105 N. Y. Supp. 534. Legal conclusions pleaded do not limit the effect of allegations of fact. *International Trust Co. v. Caroline*, 78 Misc. 179, 137 N. Y. Supp. 932. Admission that execution was "duly" issued and presented means according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity of procedure. *Reynolds v. Harlem Construction Co.*, 71 Misc. 446, 128 N. Y. Supp. 642.

912 n. 697. See also *Davidson v. White Plains*, 197 N. Y. 266, 90 N. E. 825.



912 n. 699. See *Savage v. Sully*, 74 Misc. 98, 131 N. Y. Supp. 619. Rule applied to admissions in a pleading. *Lawyers' Title Ins. Co. v. Kelly*, 132 N. Y. Supp. 721.

912 n. 701. But see *Kraus v. Birnbaum*, 200 N. Y. 130, 93 N. E. 474. An admission in a counterclaim, while not conclusive as against a general denial, may nevertheless be considered with the other evidence received on the trial in determining and deciding the issues. *Talbot v. Laubheim*, 188 N. Y. 421, 81 N. E. 163.

913 n. 708. *Backer v. Passman*, 132 N. Y. Supp. 787. Alleging that contract was "duly assigned" precludes questioning the validity of such assignment. *Contractors' Supply Co. v. New York*, 153 App. Div. 60, 138 N. Y. Supp. 242. Evidence in contradiction to admissions in the pleadings, though admitted without objection, must be disregarded. *Pennacchio v. Greco*, 107 App. Div. 225, 94 N. Y. Supp. 1061.

913 n. 709. See also *Pennacchio v. Greco*, 107 App. Div. 225, 94 N. Y. Supp. 1061.

914 n. 711. *Bradt v. McClenahan*, 118 App. Div. 768, 103 N. Y. Supp. 884. See also *Persbacker v. Murphy*, 153 App. Div. 492, 138 N. Y. Supp. 537.

914 n. 717. See also *McKane v. Dady*, 128 App. Div. 190, 112 N. Y. Supp. 650.

915 n. 720. *Tautphoeus v. Harbor & S. Bldg. & Sav. Ass'n*, 96 App. Div. 23, 88 N. Y. Supp. 709.

915 n. 723. See also *Fuller Buggy Co. v. Waldron*, 94 N. Y. Supp. 1017. Promptly returning by registered mail is sufficient; and if the party declines to receive it because required to sign a receipt a personal return the first business day after knowledge of such refusal is sufficient. *Abendroth & Root Mfg. Co. v. Frazier & Co.*, 140 App. Div. 922, 125 N. Y. Supp. 293.

915 n. 724. When return is made in twenty-four hours, see *Sweeney v. O'Dwyer*, 45 Misc. 43, 90 N. Y. Supp. 806.

**916 n. 730.** Waiting a year to move to compel acceptance of answer is not laches where motion made as soon as defendant learned plaintiff was about to bring the issues to trial. *Sugerman v. Jacobs*, 160 App. Div. 411, 145 N. Y. Supp. 429.

## CHAPTER II

### THE COMPLAINT

**917.** Order for substituted complaint on loss of original many years before, reversed. *Townsend v. Fayetteville*, 134 App. Div. 847, 119 N. Y. Supp. 198.

**918 n. 2.** The second subdivision of this Code provision was amended by Laws 1904, c. 500, so as to require a "clear, precise, and unequivocal" statement of the facts, and omitted the clause "without unnecessary repetition." By Laws 1905, c. 431, it was again changed so as to make it read precisely as before the amendment of 1904.

**919 n. 6.** *Jacobs v. Callan*, 143 App. Div. 827, 128 N. Y. Supp. 295.

**919 nn. 6, 7.** There is a well-recognized exception to this rule in that where it appears that the county named in the complaint as the place of trial is different from that named in the summons, and such act was merely an inadvertence, then the place of trial is not changed, provided the plaintiff's attorney moves promptly in the matter to correct the error, so as not to permit his adversary to presume the change was intentional. *Goldstein v. Marx*, 73 App. Div. 545, 77 N. Y. Supp. 956; *Tolhurst v. Howard*, 94 App. Div. 439, 88 N. Y. Supp. 235; *Bell v. Polymero*, 99 App. Div. 303, 90 N. Y. Supp. 920.

**919 n. 13.** This applies also to a corporation. *McNeal v. Hayes Mach. Co.*, 118 App. Div. 130, 103 N. Y. Supp. 312.

**920.** Adding title of office to name of commissioner of

highways, in action for his neglect, does not make the action other than a personal one. *Campbell v. Powers*, 155 App. Div. 862, 140 N. Y. Supp. 675.

**920** n. 22. But see *Dilcher v. Nellany*, 52 Misc. 364, 102 N. Y. Supp. 264.

**921** n. 24. *Willets v. Haines*, 96 App. Div. 5, 88 N. Y. Supp. 1018; *Newland v. Zodikow*, 39 Misc. 541, 80 N. Y. Supp. 375. Suing a person, with the words "administratrix" of a certain estate added, but omitting the word "as" does not necessarily show that the action is against defendant as an individual. *Gatti-McQuade Co. v. Flynn*, 79 Misc. 430, 140 N. Y. Supp. 135.

**922** § 848. Plaintiff must allege nonpayment. *Posner v. Rosenberg*, 149 App. Div. 272, 133 N. Y. Supp. 704. In action on account stated, plaintiff must allege nonpayment. *Bremer v. Ring*, 146 App. Div. 724, 131 N. Y. Supp. 487. If wrongful intent is a necessary element of the cause of action, it must be alleged. *Ellsworth v. Shimer*, 71 Misc. 576, 128 N. Y. Supp. 883. Sufficiency of allegations of performance of contract, see *Sullivan v. Murphy*, 120 N. Y. Supp. 55. One seeking to maintain an action under a statute must state every fact required to enable the court to judge whether he has a cause of action under the statute. *Ithaca Fire Dept. v. Rice*, 108 App. Div. 100, 95 N. Y. Supp. 464; *People v. Koster*, 50 Misc. 46, 97 N. Y. Supp. 829. Conditions precedent must be pleaded. *Turner v. Lane*, 47 Misc. 387, 93 N. Y. Supp. 1083.

**923.** In setting forth a contract, all the terms thereof need not be pleaded. *People v. American Ice Co.*, 135 App. Div. 180, 120 N. Y. Supp. 41. Alleging that plaintiff "performed all the conditions" held sufficient. *Wertheim v. Maintenance Co.*, 135 App. Div. 760, 119 N. Y. Supp. 909. Where contract is pleaded in full, it need not be characterized as a sale. *Hargraves Mills v. Gordon*, 137 App. Div. 695, 122 N. Y. Supp. 245. Need not expressly allege that

plaintiff sues as trustee of an express trust. *Weber v. Columbia Amusement Co.*, 160 App. Div. 835, 146 N. Y. Supp. 53. In action by foreign corporation, see *Acorn Brass Mfg. Co. v. Rutenberg*, 147 App. Div. 533, 132 N. Y. Supp. 600. A complaint in a county court, in an action for money only, must show the residence of defendant within the county. *Perlman v. Gunn*, 41 Misc. 166, 83 N. Y. Supp. 986.

923 n. 40. A cestui que trust can maintain an action in relation to the trust property only after the trustee has refused to sue, and the complaint must show such refusal. *Woolf v. Barnes*, 46 Misc. 169, 93 N. Y. Supp. 219.

923 n. 42. It is sufficient to allege that plaintiff was duly appointed guardian by the Surrogate's Court of a specified county. *Schlieder v. Dexter*, 114 App. Div. 417, 99 N. Y. Supp. 1000.

924. A general statement that there is no adequate remedy at law is not essential in a complaint in a suit in equity where it is manifest from the facts alleged that an action at law would give but an inadequate and imperfect remedy to the party aggrieved. *International Paper Co. v. Hudson River Water Power Co.*, 92 App. Div. 56, 68, 86 N. Y. Supp. 736. Where, in an action in equity, relief is sought to be obtained and the amounts to be paid by either party to the other are uncertain and subject to an accounting between the parties, it is enough to offer in the complaint to pay or perform whatever obligations rest on the plaintiff. *International Paper Co. v. Hudson River Water Power Co.*, 92 App. Div. 56, 70, 86 N. Y. Supp. 736. The complaint, in an action by a foreign corporation on a New York contract, must allege that it has obtained a certificate from the state of authority to do business. *Welsbach Co. v. Norwich Gas & Electric Co.*, 96 App. Div. 52, 89 N. Y. Supp. 284; *Wood & Selick v. Ball*, 114 App. Div. 743, 100 N. Y. Supp. 119. In action by foreign corporation,

it is sufficient to allege that plaintiff "was then and still is duly authorized to do business in the state of New York." *United Building Material Co. v. Odell*, 67 Misc. 584. If plaintiff is a foreign corporation, the country under whose laws it was created should be stated. *Kaulbach v. Knickerbocker Trust Co.*, 139 App. Div. 566, 124 N. Y. Supp. 286. Statements in complaint by foreign corporation, see *Chicago Crayon Co. v. Slattery*, 68 Misc. 148, 123 N. Y. Supp. 987. Performance of conditions on part of plaintiff must be alleged. *N. Y. City Estates Co. v. Central Realty Co.*, 118 N. Y. Supp. 1054, 2 Current Ct. Dec. 276. Copy of contract annexed to complaint and referred to therein is deemed a part of the complaint. *Schroeder v. Fine*, 131 N. Y. Supp. 575; *Posner v. Rosenberg*, No. 2, 149 App. Div. 272, 133 N. Y. Supp. 704.

924 n. 47. See *Bouton v. Wheeler*, 118 App. Div. 426, 104 N. Y. Supp. 33.

925 n. 55. *Henneke v. Schmidt*, 121 App. Div. 516, 106 N. Y. Supp. 138. Failure to urge in answer waives the objection to the want of such statement. *People v. Bailey*, 136 App. Div. 130, 120 N. Y. Supp. 618. Need not allege residence "at the time of the commencement of the action." *Curran v. Arp*, No. 1, 141 App. Div. 38, 125 N. Y. Supp. 758. Where defendant is a domestic corporation, must allege that its principal place of business is in the county. *Meyers v. Amer. Locomotive Co.*, 201 N. Y. 163, 94 N. E. 605 [aff. 140 App. Div. 882].

925 n. 58. See also *Schlieder v. Dexter*, 114 App. Div. 417, 99 N. Y. Supp. 1000. Such practice is held proper in *Reilly v. Steinhardt*, 58 Misc. 471, 111 N. Y. Supp. 472.

925 n. 62. *Silverman v. Weir*, 114 N. Y. Supp. 6. Freedom from contributory negligence need not be alleged. *Klein v. Burleson*, 138 App. Div. 405, 122 N. Y. Supp. 752. In an action for goods sold, the complaint need not allege a new promise in writing to pay the debt which had been

discharged in bankruptcy. *Gruenberg v. Treanor*, 40 Misc. 232, 81 N. Y. Supp. 675. But nonpayment must be alleged. *Bacon v. Chapman*, 85 App. Div. 309, 82 N. Y. Supp. 545. The following rules are laid down in *Conklin v. Weatherwax*, 181 N. Y. 258, 268, as to pleading nonpayment:

"1. In an action upon contract for the payment of money only, where the complaint does not allege a balance due over and above all payments made, it is sufficient for the plaintiff to allege and prove a breach of the obligation by the nonpayment thereof when it matured, as the presumption of nonpayment continues until met by the allegation and proof of payment.

"2. When the complaint sets forth a balance in excess of all payments, owing to the structure of the pleading, it is necessary for the plaintiff to prove the allegations so made, and this leaves the amount of the payments open to the defendant under a general denial.

"3. When the action is not upon contract for the payment of money, but is upon an obligation created by operation of law, or is for the enforcement of a lien where nonpayment of the amount secured is part of the cause of action, it is necessary both to allege and prove the fact of nonpayment." The rule in this case is followed, in so far as the necessity of pleading nonpayment is concerned, in *Sweeney v. Metropolitan Surety Co.*, 129 App. Div. 22, 113 N. Y. Supp. 126; *Dickinson v. Tysen*, 125 App. Div. 735, 110 N. Y. Supp. 269. Sufficiency of allegations as to nonpayment, see *Babcock v. Anson*, 122 App. Div. 73, 106 N. Y. Supp. 642. Nonpayment must be alleged by plaintiff in an action on an obligation created by operation of law or for the enforcement of a lien where nonpayment is part of the cause of action. *Ebling v. Nekarda*, 148 App. Div. 193, 132 N. Y. Supp. 309.

925 n. 63. *Church v. Stevens*, 56 Misc. 572, 107 N. Y.

Supp. 310. Plaintiff need not plead an exception taking the case out of the statute of limitations where the cause of action set forth is not necessarily barred. *Metz v. Metz*, 45 Misc. 338, 90 N. Y. Supp. 340.

925 n. 64. *Avery v. Lee*, 117 App. Div. 244, 102 N. Y. Supp. 12; *Yracheta v. Stanford*, 120 N. Y. Supp. 117.

926 n. 70. *Marrietta v. Cleveland, C. C. & St. L. R. Co.*, 52 Misc. 16, 100 N. Y. Supp. 1027. A distinctly numbered paragraph may be incorporated in the statement of a subsequent cause of action, by reference thereto as such. *Bigelow v. Drummond*, 98 App. Div. 499, 90 N. Y. Supp. 913, which reverses 42 Misc. 617, 87 N. Y. Supp. 581, which held that it is not sufficient to insert a statement that plaintiffs "repeat and reallege all the statements contained in paragraphs I. and III. of the first cause of action, but as relating to the omissions of the defendant herein-after mentioned."

926 n. 71. A complaint is not demurrable because of the failure to repeat in each cause of action the preliminary allegations setting forth the capacity of plaintiff to sue. *Bigelow v. Drummond*, 98 App. Div. 499, 90 N. Y. Supp. 913.

927 n. 78. See also post, 1001 § 893.

927 n. 81. *Patterson v. Meyerhofer*, 204 N. Y. 96, 97 N. E. 472. See also *Staley v. Albro*, 150 App. Div. 60, 133 N. Y. Supp. 923.

927 n. 82. See also post, 1001 § 893.

928 n. 83. *Hockstein v. Schlanger*, 150 App. Div. 124, 134 N. Y. Supp. 704. *Kuntz v. Schnugg*, 99 App. Div. 191, 90 N. Y. Supp. 933.

928 n. 92. *Frick v. Freudenthal*, 45 Misc. 348, 90 N. Y. Supp. 344.

930 n. 100. Complaint will not be stricken but amendment allowed. *Wohlfarth v. National Export Ass'n of American Mnfrs.*, 53 Misc. 137, 107 N. Y. Supp. 540.

## CHAPTER III

## ANSWER

**937.** The answer must be served within twenty days after service of the complaint—not twenty days after date of admission of service of the complaint which was antedated by mistake. *Tolhurst v. Howard*, 94 App. Div. 439, 88 N. Y. Supp. 235.

**937 n. 6.** *Van Zandt v. Van Zandt* is followed in *Sanders v. People's Co-op. Ice Co.*, 44 Misc. 171, 89 N. Y. Supp. 785.

**937 n. 7.** Where the nonresident defendant had no property in this state at the time of substituted service of summons, but some months later property came into this state which plaintiff attached, defendant's time to appear and answer is to be reckoned from the time of the attachment. *Haase v. Michigan Steel Boat Co.*, 148 App. Div. 298, 132 N. Y. Supp. 1046.

**938.** An order compelling plaintiff to accept an amended answer, after the time allowed by the order permitting the amendment has expired, is proper, where the delay was caused by the inability to secure defendant's verification because of his illness. *Tracy v. Lichtenstadter*, 113 App. Div. 75, 99 N. Y. Supp. 331.

**939.** See also ante, **695**. An order extending the time to answer remains in full force until the order vacating it is actually signed and entered, so that an answer served after the vacating order is granted but before it is signed and entered is served in time. *De Pallandt v. Flynn*, 93 N. Y. Supp. 678; *Levy v. New York Press Co.*, 57 Misc. 138, 107 N. Y. Supp. 541. Where a demurrer is overruled with leave to defendant to plead over, it is improper to afterwards extend the time to answer until after his appeal from the order overruling the demurrer is decided. *Nillson v. Lawrence*,



148 App. Div. 155, 132 N. Y. Supp. 664. In action on undertaking on appeal, held proper to refuse to extend time until after determination of another appeal. *Gelder v. National Surety Co.*, 133 N. Y. Supp. 1029.

939 n. 19. See *Nillson v. Lawrence*, 148 App. Div. 155, 132 N. Y. Supp. 664.

939 n. 20. *Tuska v. Heller Hirsh & Co.*, 140 App. Div. 323, 125 N. Y. Supp. 182.

939 n. 22. By amendment of this rule in 1910, the alternative provision relative to an affidavit of merits is stricken out, and the affidavit of the attorney or counsel for the party seeking the extension, is required in all cases. So the last clause relating to date of issue has been stricken out. If the moving papers do not comply with this rule, the extension of time granted may be set aside. *Kinley v. American Hardware Mfg. Co.*, 49 Misc. 334, 99 N. Y. Supp. 199.

940 n. 25. *Peters v. Miller*, 150 App. Div. 249, 134 N. Y. Supp. 881.

940 nn. 25, 26. *Sherman v. McCarthy*, 90 App. Div. 542, 85 N. Y. Supp. 727. Same rule applies to a stipulation extending the time to answer. *Bonta Hotel Co. v. Benedict*, 133 N. Y. Supp. 462.

941 n. 31. The second subdivision of this Code section was amended by Laws 1904, c. 500, by leaving out the words "without repetition," and by changing the clause "in ordinary and concise language" to a "clear, precise, and unequivocal statement." By Laws 1905, c. 431, it was again changed so as to read precisely as before the 1904 amendment.

942 n. 35. See *O'Neil v. Franklin Fire Ins. Co.*, 159 App. Div. 313, 145 N. Y. Supp. 432.

942 § 855. Defendant cannot serve separate answers to different causes of action set out in the complaint. *Morley v. Combs*, 124 N. Y. Supp. 19.

943 n. 40. *Myers v. Stein*, 154 App. Div. 631, 139 N. Y.

Supp. 762; *Lord v. Woolley*, 82 Misc. 656, 144 N. Y. Supp. 385.

**943** n. 41. "A denial must be direct and unequivocal." *New York Coach, etc., Co. v. Brown*, 82 Misc. (N. Y.) 92, 93, 143 N. Y. Supp. 100 [citing 1 *Nichols*' N. Y. Pr. 943].

**943** n. 43. So the phrase "states" that he denies is sufficient. *Kirschbaum v. Eschmann*, 205 N. Y. 127, 98 N. E. 328.

**943** n. 44. But a denial is not nugatory because preceded by the words "for a second (or third or fourth) further, separate, and distinct defense," etc. *Hopkins v. Meyer*, 76 App. Div. 365, 78 N. Y. Supp. 459.

**943** nn. 44-46. See also post, **959** n. 171.

**943** n. 45. *Blumenfeld v. Stine*, 42 Misc. 411, 87 N. Y. Supp. 81.

**943** n. 47. A denial of immaterial allegations does not raise an issue. *Ubart v. Baltimore & O. R. Co.*, 117 App. Div. 831, 102 N. Y. Supp. 1000.

**944** n. 49. Denial merely of legal conclusions warrants judgment on the pleadings. *German Savings Bank v. Dunn*, 75 Misc. 251, 135 N. Y. Supp. 56.

**945** n. 58. *New York Coach & Auto Lamp Co. v. Brown*, 82 Misc. 92, 143 N. Y. Supp. 100.

**945** n. 62. *Thompson v. Wittkop*, 184 N. Y. 117, 76 N. E. 1081.

**946** n. 64. *Landesman v. Hauser*, 45 Misc. 603, 91 N. Y. Supp. 6.

**946** n. 67. The denial should not be treated as a nullity so as to deprive the party of his right to trial or to amend. "The better practice is to move to have the pleading made more specific and certain." *Thompson v. Wittkop*, 184 N. Y. 117, 76 N. E. 1081.

**946** n. 69. *Feinberg v. Allen*, 143 App. Div. 866, 128 N. Y. Supp. 906; *Ebling Brewing Co. v. Weisel*, 139 App. Div. 634, 124 N. Y. Supp. 73; *Jacobs v. Wanamaker*, 77 Misc. 563,

138 N. Y. Supp. 387; *Clark v. Ford*, 121 App. Div. 742, 106 N. Y. Supp. 462; *Adams v. Lawson*, 188 N. Y. 460, 81 N. E. 315; *Weil v. Unique Electric Device Co.*, 39 Misc. 527, 80 N. Y. Supp. 484. In an action by an officer to recover salary, any fact tending to show that he was not legally an officer is available under a general denial. *Murtagh v. New York*, 106 App. Div. 98, 94 N. Y. Supp. 308. Defense that claim under policy had not accrued may be set up. *Miles v. Casualty Co. of America*, 203 N. Y. 453, 96 N. E. 744.

**946 n. 70.** In an action for conversion, defendant is entitled to show title in a stranger under a general denial. *Ten Eyck v. Keller*, 99 App. Div. 106, 91 N. Y. Supp. 169.

**946 n. 71.** *Hayes v. Hoyt*, 138 App. Div. 573, 123 N. Y. Supp. 357; *Marks v. O'Donnell*, 66 Misc. 147, 121 N. Y. Supp. 214. Partial consideration cannot be shown. *Wray v. Miller*, 120 N. Y. Supp. 787.

**947 n. 74.** *Caffee v. Sax Lumber Co.*, 139 App. Div. 746, 124 N. Y. Supp. 325.

**947 n. 75.** Otherwise where illegality does not appear from face of complaint. *Rabinowitz v. Cunard S. S. Co.*, 119 N. Y. Supp. 625.

**947 nn. 75, 76.** But where the illegality does not appear on the face of the complaint or necessarily from plaintiff's evidence, it cannot be taken advantage of under a general denial. *Lee v. Lee*, 40 Misc. 251, 253, 81 N. Y. Supp. 986. See also *Coverly v. Terminal Warehouse Co.*, 85 App. Div. 488, 83 N. Y. Supp. 369 (as to sufficiency of plea that contract is against public policy).

**947 n. 77.** See also post, **954 n. 135.** *Harder v. Continental Printing & Playing Card Co.*, 64 Misc. 89, 117 N. Y. Supp. 1001. Necessity for alleging nonpayment in complaint, see ante, **925 n. 62.**

**947 n. 78.** *Klein v. Burleson*, 138 App. Div. 405, 122

N. Y. Supp. 752. Special damages not alleged cannot be proved. *Keefe v. Lee*, 197 N. Y. 68, 90 N. E. 344.

**947** § 859. Denial of knowledge or information as to the truth "of any of the allegations in paragraphs (naming them) of the complaint" is good. *Jacobs v. Wanamaker*, 77 Misc. 563, 138 N. Y. Supp. 387 [foll. *Krischbaum v. Eschmann*, 205 N. Y. 127, 98 N. E. 328]. Denial as to the third and fourth "allegations" of the answer is sufficient. *Smith v. Metropolitan Life Ins. Co.*, 79 Misc. 550, 140 N. Y. Supp. 327. "A denial of 'material' allegations is wholly insufficient and raises no issue." *New York Coach, etc., Co. v. Brown*, 82 Misc. 92, 93, 143 N. Y. Supp. 100. Denial as to "other material allegations" of the complaint is insufficient. *Swing v. Engle*, 143 App. Div. 181, 127 N. Y. Supp. 322.

**948.** Denial as to "the allegations contained in paragraphs IV, V, VI, VII" of the complaint is not bad as conjunctive and involving a negative pregnant. *Curran v. Arp*, 141 App. Div. 659, 125 N. Y. Supp. 993. Answer denying each and every allegation in paragraphs referred to by their number held not negative pregnant. *Electrical Accessories Co. v. Mittenthal*, 194 N. Y. 473, 87 N. E. 684 [reversing 128 App. Div. 902, 112 N. Y. Supp. 1128]. A denial of the allegations of the complaint "as alleged" is bad as a negative pregnant where not denying the substance of the complaint. *Hutchinson v. Bien*, 104 App. Div. 214, 46 Misc. 302, 93 N. Y. Supp. 189, 216. But in an action on a contract, a denial that plaintiff has performed all the conditions precedent is not bad as a negative pregnant, since the failure to perform any one condition precedent would be fatal. *Electric Equipment Co. v. Feuerlicht*, 90 N. Y. Supp. 467. A negative pregnant may be disregarded on appeal. *Frees v. Blyth*, 99 App. Div. 541, 91 N. Y. Supp. 103. Denial held not a negative pregnant. *Carleton v. Lawrence*, 77 Misc. 573, 137 N. Y. Supp. 200.

**948** n. 83. Denial that defendant had on deposit a certain sum only. *Lafayette Trust Co. v. Haldane*, 146 App. Div. 553, 131 N. Y. Supp. 171.

**948** n. 84. *Electrical Accessories Co. v. Mittenthal*, 194 N. Y. 473, 87 N. E. 684 [reversing 128 App. Div. 902, 112 N. Y. Supp. 1128].

**949** § 861. Defendant may plead a qualified denial along with his general denial. *De Ajuria v. Berwind*, 127 App. Div. 528, 111 N. Y. Supp. 1029.

**950** § 863. When denial of knowledge or information proper, in general, see *Kirschbaum v. Eschmann*, 205 N. Y. 127, 98 N. E. 328. A denial in the form "he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I and III of said complaint," thus departing from the phraseology of the Code by omitting "thereof" and interpolating "the truth of," is insufficient. *Rochkind v. Perlman*, 123 App. Div. 808, 108 N. Y. Supp. 224, 1151; *Jurgens v. Wichmann*, 124 App. Div. 529, 108 N. Y. Supp. 881; *Baum v. Elias*, 64 Misc. 43, 117 N. Y. Supp. 935. A denial on information and belief of information sufficient to form a belief is insufficient. *Ubart v. Baltimore & O. R. Co.*, 117 App. Div. 831, 102 N. Y. Supp. 1000. A denial of knowledge or information is improper where the facts alleged impart personal knowledge of defendant. *Schwartz v. Ribaud*, 52 Misc. 102, 101 N. Y. Supp. 599.

**950** n. 97. See also post, **1072** nn. 97, 98. *Walsh v. Barrett*, 154 App. Div. 461, 139 N. Y. Supp. 68; *Johnston v. Simpson Crawford Co.*, 115 N. Y. Supp. 141; *Connolly v. Schroeder*, 121 App. Div. 634, 106 N. Y. Supp. 303. And it is immaterial that words "or falsity" are added. *Scully v. Wolff*, 56 Misc. 468, 107 N. Y. Supp. 181. The word "each" need not be used. *Hinds, Noble & Eldredge v. Bonner*, 63 Misc. 258, 116 N. Y. Supp. 663. Cannot so deny where a palpable falsehood. *Rochkind v. Perlman*,

123 App. Div. 808, 108 N. Y. Supp. 224, 1151. Such a denial raises no issue as to personal matters. In re Clement, 132 App. Div. 548, 117 N. Y. Supp. 30; Bloch v. Bloch, 131 App. Div. 859, 116 N. Y. Supp. 339. Denial of knowledge sufficient to form a belief is insufficient where party has knowledge or ready means of knowledge. Theobald v. U. S. Rubber Co., 157 App. Div. 446, 142 N. Y. Supp. 187. It is not sufficient to deny knowledge or information sufficient to form a belief "as to the allegations contained" in a specified paragraph of the complaint, where such paragraph contains several allegations of fact some of which must be within the personal knowledge of the pleader. Kirschbaum v. Eschmann, 205 N. Y. 127, 98 N. E. 328. Where denial of knowledge or information is as to matter presumptively within the pleader's knowledge, or as to the statutes of a sister state which are easy of access, it is insufficient, and judgment on the pleadings is proper. Olsen v. Singer Mfg. Co., 143 App. Div. 142, 127 N. Y. Supp. 697. However, it has been held that defendant may deny knowledge or information as to statute of a sister state. Van Tassell v. Manhattan Electrical Supply Co., 83 Misc. 127, 144 N. Y. Supp. 793. Not permissible in case of personal transactions or where matters of public record. Preston v. Cuneo, 140 App. Div. 144, 124 N. Y. Supp. 1031.

951. It is not sufficient to deny "knowledge or information sufficient to form a belief as to the truth in any of the allegations" in certain paragraphs of the complaint. Jurgens v. Wichmann, 124 App. Div. 531, 108 N. Y. Supp. 881. Insufficient to allege "no knowledge or information sufficient to form a belief as to the contents of the said notice," etc. Rochkind v. Perlman, 123 App. Div. 808, 108 N. Y. Supp. 224, 1151. Denial of "knowledge or information" instead of "any knowledge or information" is sufficient. Hidden v. Godfrey, 88 App. Div. 496, 85 N. Y. Supp. 197. But a denial of "information sufficient to form a

belief," etc., without referring to "knowledge," is insufficient. *Meuer v. Phenix Nat. Bank*, 87 App. Div. 281, 84 N. Y. Supp. 321.

**951 n. 102.** This statement in the text is not supported by the later cases which generally hold that such a denial is not ordinarily proper as to matters of record. *Dahlstrom v. Gemunder*, 198 N. Y. 449, 92 N. E. 106 [rev. 133 App. Div. 69]; *Rochkind v. Perlman*, 123 App. Div. 808, 108 N. Y. Supp. 224, 1151; *Schwartz v. Ribaud*, 52 Misc. 102, 101 N. Y. Supp. 599; *People ex rel. Martin v. Kenyon*, 134 N. Y. Supp. 1007. Compare *Smith Contracting Co. v. New York*, 70 Misc. 132, 128 N. Y. Supp. 351. In other words, such a denial is presumptively, but not necessarily, false or frivolous. *Harley v. Plant*, 210 N. Y. 405 (where the court said: "A rule that a defendant cannot, under any circumstances, effectively deny by his answer, knowledge or information of facts presumptively provable by a public record sufficient to form a belief would be dangerous and unjust. Public records not infrequently are misplaced or lost, are sometimes abstracted from their proper depositories or destroyed by fire or other causes. In such or analogous cases proof of the facts alleged should not be dispensed with arbitrarily through the impossibility of denying them. It may safely be held, as it was in *Kirschbaum v. Eschmann* [205 N. Y. 127] that denials in such form of allegations which relate to matters of public records, open by law to everybody, are presumptively false or frivolous").

**951 n. 103.** Compare *White v. Gibson*, 61 Misc. 436, 113 N. Y. Supp. 983. Alleging that defendant has no knowledge as to the truth of the allegations of the complaint and therefore denies the same is insufficient. *Finn v. Post*, 61 Misc. 136, 112 N. Y. Supp. 1046.

**951 n. 107.** To same effect, *Genninger v. Frank A. Wahlig Co.*, 116 N. Y. Supp. 578.

**951 n. 108.** *New York v. Halsey*, 134 App. Div. 192, 116

N. Y. Supp. 947. So merely alleging want of information is insufficient. *Locomobile Co. of America v. De Witt*, 59 Misc. 221, 110 N. Y. Supp. 413.

952 n. 114. *Engel v. Georgiades*, 140 N. Y. Supp. 93.

952 n. 115. *Engel v. Georgiades*, 140 N. Y. Supp. 93.

953 n. 117. *Childs v. Childs*, 150 App. Div. 656, 135 N. Y. Supp. 972.

953 § 864. Defense shown by contract introduced in evidence by plaintiff is available although not pleaded. *Diamond v. Mendelsohn*, 156 App. Div. 636, 141 N. Y. Supp. 775.

953 n. 121. *Blixt v. Eltoma Realty Co.*, 138 App. Div. 499, 122 N. Y. Supp. 861; *Bean v. Flint*, 138 App. Div. 846, 123 N. Y. Supp. 385; *Hillyer v. Le Roy*, 84 App. Div. 129, 82 N. Y. Supp. 80. Compare *Richie v. Shepard*, 158 App. Div. 192, 143 N. Y. Supp. 19. But where plaintiff himself proves a defense as a part of his case, he cannot contend that it is not available to defendant because not pleaded. *Wright Steam Engine Works v. McAdam*, 113 App. Div. 872, 99 N. Y. Supp. 577; *Ehrenfried v. Lackawanna Iron & Steel Co.*, 89 App. Div. 130, 85 N. Y. Supp. 57.

953 n. 122. *Schwartz v. Ribaud*, 52 Misc. 102, 101 N. Y. Supp. 599.

953 § 865. The objection that the complaint does not state facts constituting a cause of action, as appears on the face thereof, cannot be set up by answer. *Jackson v. Savage*, 109 App. Div. 556, 96 N. Y. Supp. 366.

953 n. 124. *Schultz v. Greenwood Cemetery*, 46 Misc. 299, 93 N. Y. Supp. 180.

954. By amendment in 1913, section 841b is added to the Code, as follows: "On the trial of any action to recover damages for causing death the contributory negligence of the person killed shall be a defense, to be pleaded and proven by the defendant." The Labor Law provides the same as to



actions by a servant against his master for personal injuries. Assumption of risk need not be pleaded. *Dixon v. N. Y., Ontario & Western R. R. Co.*, 198 N. Y. 58, 91 N. E. 271. Want of consideration for a note must be pleaded. *Ryan v. Sullivan*, 143 App. Div. 471, 128 N. Y. Supp. 632. Election of remedies must be pleaded. *Henry v. Herrington*, 193 N. Y. 218, 80 N. E. 29. Laches must be pleaded. *Treadwell v. Clark*, 190 N. Y. 51, 82 N. E. 505. The nonresidence of the plaintiff, to show lack of jurisdiction, must be pleaded. *Ubart v. Baltimore & O. R. Co.*, 117 App. Div. 831, 102 N. Y. Supp. 1000. In an equitable suit defendant may set up in his answer matter which occurred after the commencement of the action and the service of the complaint. *Wormser v. Metropolitan St. R. Co.*, 98 App. Div. 29, 33, 90 N. Y. Supp. 714. Material facts occurring after the commencement of the action but before the filing of the answer may be set up in the answer without the aid of a supplemental answer. *Burke v. Rhoads*, 39 Misc. 208, 79 N. Y. Supp. 407. That the facts stated in the complaint or counterclaim do not constitute a cause of action, while a ground of demurrer, cannot be set up as a defense in the answer or reply. *Schlesinger v. Thal-messinger*, 92 N. Y. Supp. 575. Proof of waiver of a breach of contract must be pleaded as new matter. *Grant v. Pratt & Lambert*, 87 App. Div. 490, 494, 84 N. Y. Supp. 983. That the defendant in action for goods sold and delivered is a married woman and that the goods were necessities purchased for the family is new matter. *Minners v. Smith*, 40 Misc. 648, 83 N. Y. Supp. 117. That the plaintiff, a foreign corporation, has no certificate to do business in New York, is new matter. *International Society v. Dennis*, 76 App. Div. 327, 78 N. Y. Supp. 497; *Lehigh & N. E. R. Co. v. American Bonding & Trust Co.*, 40 Misc. 698, 83 N. Y. Supp. 191. Defense that foreign corporation was doing business in this state must be pleaded. *Singer Sewing, etc., Co. v. Foster*, 75 Misc. 641, 133 N. Y. Supp. 1072.

**954 n. 128.** Sufficiency of plea, see *Ariston Realty Co. v. Bernstein*, 111 N. Y. Supp. 538.

**954 n. 129.** Sufficiency of plea of tender, see *Schiek v. Donohue*, 77 App. Div. 321, 79 N. Y. Supp. 233.

**954 n. 130.** *Wood v. Proudman*, 122 App. Div. 826, 107 N. Y. Supp. 757; *National Radiator Co. v. Hull*, 79 App. Div. 109, 79 N. Y. Supp. 519.

**954 n. 135.** *Posner v. Rosenberg*, No. 2, 149 App. Div. 272, 133 N. Y. Supp. 704; *Stumff v. Cohen*, 78 Misc. 158, 137 N. Y. Supp. 905; *Ariston Realty Co. v. Bernstein*, 111 N. Y. Supp. 538; *Rogers v. T. H. Simonson & Son Co.*, 45 Misc. 323, 90 N. Y. Supp. 298; *Forbes v. Wheeler*, 39 Misc. 538, 80 N. Y. Supp. 373; *Harder v. Continental Printing & Playing Card Co.*, 64 Misc. 89, 117 N. Y. Supp. 1001. See also *supra*, **947 n. 77.** Need not be pleaded where non-payment a part of plaintiff's cause of action. *Altman v. Bungay Co.*, 161 App. Div. 583, 146 N. Y. Supp. 949; *Posner v. Rosenberg*, No. 2, 149 App. Div. 272, 133 N. Y. Supp. 704. If the complaint admits part payments, a general denial does not authorize proof of payments beyond the amounts admitted. *Acharan v. Samuel Bros.*, 144 App. Div. 182, 128 N. Y. Supp. 943. Evidence admissible under plea of payment, see *Uvalde Asphalt Paving Co. v. National Trading Co.*, 135 App. Div. 391, 120 N. Y. Supp. 11.

**954 n. 137.** Estoppel must be pleaded. *Continental Securities Co. v. Belmont*, 75 Misc. 234, 133 N. Y. Supp. 560.

**954 n. 138.** *Chever v. British-American Ins. Co.*, 86 App. Div. 333, 83 N. Y. Supp. 728. "Where fraud is claimed by which a person is induced to enter into a contract with brokers or others, and such fraud is relied upon as a defense in an action upon the contract it should be pleaded as an affirmative defense. In an action upon any contract, however, evidence to show that the person bringing the action has failed to perform his contract in whole or in part is competent under a general denial. It is not necessary in

pleading to allege specifically facts to show the failure of the person bringing the action to carry out the contract upon which the action is brought. Proof of bad faith in carrying out the agreement sued upon or failure in any way honestly, fairly and in good faith to carry out the contract upon which the action is brought can be asserted and shown under a general denial." *Dickinson v. Tysen*, 209 N. Y. 395, 401, 103 N. E. 703.

955 n. 142. See ante, 947 nn. 75, 76.

955 n. 143. *Milholland v. Payne*, 159 App. Div. 10, 143 N. Y. Supp. 1090; *Weigert v. Schlesinger*, 150 App. Div. 765, 135 N. Y. Supp. 335; *Ackley v. Skinner*, 65 Misc. 142; 120 N. Y. Supp. 1105; *Fresno Home Packing Co. v. Turle & Skidmore*, 60 Misc. 79, 111 N. Y. Supp. 839; *New York Fireproof Tenement Ass'n v. Stanley*, 105 App. Div. 432, 94 N. Y. Supp. 160; *Banta v. Banta*, 84 App. Div. 138, 82 N. Y. Supp. 113; *Seamans v. Barentsen*, 78 App. Div. 36, 79 N. Y. Supp. 212. The defense may be raised by the answer where the complaint does not show on its face whether the agreement was in writing. *Daniels v. Rogers*, 108 App. Div. 338, 96 N. Y. Supp. 642. Whether contract is oral or written need not be alleged in the complaint. *Rubin v. Cohen*, 129 App. Div. 395, 113 N. Y. Supp. 843.

955 nn. 143-146. The statute of frauds may be raised by answer though the invalidity of the contract appears on the face of the complaint so as to make the complaint demurrable. *Seamans v. Barentsen*, 180 N. Y. 333, 73 N. E. 42.

955, last sentence. But where the plaintiff pleads a written contract, the statute need not be pleaded to be available where the plaintiff proves an oral contract. *Brauer v. Oceanic Steam Nav. Co.*, 178 N. Y. 339, 70 N. E. 863 [followed in *Levin v. Dietz*, 106 App. Div. 208, 94 N. Y. Supp. 419]. So where the complaint states a cause of action

on an oral contract, which, by its terms as averred, does not fall within the statute of frauds, it is not necessary to plead the statute as an affirmative defense in order to take the objection on the trial that the contract actually proved is within the statute. *Fanger v. Caspacy*, 87 App. Div. 417, 84 N. Y. Supp. 410; *Closson v. Thompson Pulp & Paper Co.*, 112 App. Div. 273, 97 N. Y. Supp. 1113; *Bierman v. Simon*, 110 N. Y. Supp. 267.

956 n. 147. *McNair v. McNair*, 140 App. Div. 226, 125 N. Y. Supp. 1; *Arnold v. North Tarrytown*, 137 App. Div. 68, 122 N. Y. Supp. 920. Compare *Shattuck v. Guardian Trust Co.*, 145 App. Div. 734, 130 N. Y. Supp. 658.

957 n. 154. *Almy v. Hammer*, 121 N. Y. Supp. 339, 2 Civ. Pro. (N. S.) 53; *Straight v. Shaw*, 56 Misc. 426, 107 N. Y. Supp. 1036.

957 n. 155. *Whitehall & St. John's T. & T. Co. v. Fish*, 105 N. Y. Supp. 346.

957 n. 157. *Adams v. Slingerland* is officially reported in 87 App. Div. 312.

957 n. 158. *Bauer v. Parker*, 82 App. Div. 289, 81 N. Y. Supp. 995.

957 n. 160. *Urbansky v. Shirmer*, 111 App. Div. 50, 97 N. Y. Supp. 577; *Le Vie v. Fenton*, 39 Misc. 265, 70 N. Y. Supp. 496; *Rooney v. Bodkin*, 93 App. Div. 431, 87 N. Y. Supp. 800. This rule does not apply where the absence of an adequate remedy at law is an essential part of the plaintiff's case. *Everett v. De Fontaine*, 78 App. Div. 219, 79 N. Y. Supp. 692. A denial in an answer of an allegation in the complaint that plaintiff had no adequate remedy at law is sufficient without an affirmative allegation that the plaintiff has an adequate remedy at law. *Butler v. Wright*, 103 App. Div. 463, 93 N. Y. Supp. 113; *Clements v. Sherwood-Dunn*, 108 App. Div. 327, 95 N. Y. Supp. 766.

958 n. 162. *Barber v. Barber*, 137 App. Div. 665, 122 N. Y. Supp. 452.

**958 § 866.** Insufficient where containing nothing but allegations of law. *Hodgens v. Jennings*, 148 App. Div. 879, 133 N. Y. Supp. 584. Facts stated in the complaint need not be realleged in the answer. *Schattman v. Maze Realty Co.*, 150 App. Div. 559, 135 N. Y. Supp. 47. Defense of payment need not also deny allegation of nonpayment in the complaint. *Harris v. Striker*, 77 Misc. 219, 135 N. Y. Supp. 762. Defense of statute of frauds must allege that instrument sued on was not in writing. *Krell v. Stein*, 127 N. Y. Supp. 150. Sufficiency of plea of acquiescence. *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721 [mod. 150 App. Div. 715, 135 N. Y. Supp. 789]. Sufficiency of answer setting up judgment in a prior action, see *Meth v. Butler & Herrman*, 126 N. Y. Supp. 656. If the plea of the statute of limitations is based upon the claim that the cause of action accrued at any other time than that indicated in the complaint, because the facts are otherwise than as therein indicated, those facts must be alleged to constitute a complete defense. *Devoe v. Lutz*, 133 App. Div. 856, 117 N. Y. Supp. 339. It is not sufficient to plead a waiver as a conclusion. *Ward v. Brady*, 63 Misc. 435, 116 N. Y. Supp. 456 [disapproving form of pleading waiver given in *Abbott's Forms of Pleading*, vol. 1, form 384]. An answer in a foreclosure suit alleging that no payments of interest or principal have been made to apply on the bond and mortgage since a certain date, "and more than twenty years have elapsed since the last payment was made, and said bond and mortgage are no longer a legal or enforceable claim under the statutes made and provided," sufficiently pleads limitations. *Nickell v. Tracy*, 100 App. Div. 80, 91 N. Y. Supp. 287. So a plea of the statute of limitations which alleges that the services sued for were rendered more than six years prior to the commencement of the action, is sufficient, since it will be presumed that compensation therefor was immediately due on their performance. *Bacon v. Chapman*, 85 App.

Div. 309, 82 N. Y. Supp. 545. However, a plea "that the statutory period in which to begin such an action as is here brought, to-wit, ten years, has long since expired, and that this action is consequently outlawed," is insufficient, since not averring that since the cause of action accrued. *Schrieber v. Goldsmith*, 39 Misc. 381, 79 N. Y. Supp. 846. So the alleging that the particular cause of action set forth in the complaint did not accrue within six years, instead of pleading generally that whatever cause of action the plaintiff may have had did not accrue within six years, is insufficient. *Gray Lithograph Co. v. American Watchman's Time Detector Co.*, 44 Misc. 206, 88 N. Y. Supp. 857.

**958** nn. 164-167. That a defense is not so designated, where separate and distinct and preceded by the words "defendant further answering said complaint," is sufficient. *Eells v. Dumary*, 84 App. Div. 105, 82 N. Y. Supp. 531.

**958** nn. 168-170. While the rules laid down in the text are supported by the authorities cited, it is feared that the erroneous impression may be gathered therefrom that a hypothetical pleading is always good, which is far from true. The general rule, though there is much conflict in the opinions, seems to be that a hypothetical statement is usually subject to a motion to make more definite and certain (see vol. 1, p. 845), though not necessarily so (*id.* and see cases cited on pp. 958 and 959), but is not demurrable (see post, **1003** n. 93). That hypothetical defenses are bad, see *Saleeby v. Central R. of N. J.*, 40 Misc. 269, 81 N. Y. Supp. 903.

**959.** Each separate defense must be construed as a whole independent of allegations in other defenses. *Empire Trust Co. v. Magee*, 117 App. Div. 34, 102 N. Y. Supp. 9. In an action to recover damages for breach of contract, the defense must not only confess, but also avoid or bar. If it does not fully avoid or bar, the mere allegation of the answer of a contract of other terms or of a different character has no

effect. *Barnard v. Lawyers' Title Ins. Co.*, 45 Misc. 577, 91 N. Y. Supp. 41.

**959** n. 171. *Einstein v. Einstein*, 158 App. Div. 498, 143 N. Y. Supp. 706; *Krauss Engineering Co. v. McKinnon*, 66 Misc. 181, 121 N. Y. Supp. 396; *Outcalt v. Bonheur*, 120 App. Div. 168, 104 N. Y. Supp. 1099; *Sanford v. Rhoads*, 39 Misc. 548, 80 N. Y. Supp. 404; *Jaeger v. City of N. Y.*, 39 Misc. 543, 80 N. Y. Supp. 356; *Carpenter v. Mergert*, 39 Misc. 634, 80 N. Y. Supp. 615; *Ugla v. Brokaw*, 77 App. Div. 310, 79 N. Y. Supp. 244; *Eells v. Dumary*, 84 App. Div. 105, 82 N. Y. Supp. 531; *Leonorovitz v. Ott*, 40 Misc. 551, 82 N. Y. Supp. 880. This rule does not apply where a specific denial is needed to make the defense complete. *Oishei v. N. Y. Taxicab Co.*, 136 App. Div. 683, 121 N. Y. Supp. 472; *Krauss Engineering Co. v. McKinnon*, 66 Misc. 181, 121 N. Y. Supp. 396; *Rogers v. Morton*, 46 Misc. 494, 95 N. Y. Supp. 49 (specific denials in a defense are not necessarily surplusage or immaterial, since it may be necessary to deny specific allegations of the complaint which would otherwise be admitted). A general denial in an affirmative defense is always improper, but a specific denial may be included where the new matter pleaded is not otherwise complete. *Haffen v. Tribune Ass'n*, 126 App. Div. 675, 111 N. Y. Supp. 225.

**959** n. 172. *Wormser v. Metropolitan St. R. Co.*, 98 App. Div. 29, 90 N. Y. Supp. 714.

**960**. Sufficiency of plea of limitations in suit to set aside fraudulent conveyance, see *Holland v. Grote*, 193 N. Y. 262, 86 N. E. 30 [reversing in part on other grounds, 56 Misc. 370, 107 N. Y. Supp. 667].

**960** n. 174. *Hawkins v. Mapes-Reeve Const. Co.*, 178 N. Y. 236, 241 [affirming 82 App. Div. 72, 80, 81 N. Y. Supp. 794]; *Alaska Banking, etc., Co. v. Van Wyck*, 146 App. Div. 5, 130 N. Y. Supp. 563.

**960** n. 178. It must show that the other action was

pending at the time of the commencement of the second action. *Porter v. Fuld & Hatch Knitting Co.*, 114 App. Div. 292, 99 N. Y. Supp. 815; *Hirsh v. Manhattan R. Co.*, 84 App. Div. 374, 377, 82 N. Y. Supp. 754; *O'Leary v. Tooker*, 116 N. Y. Supp. 664.

**960** n. 179. *Wenk v. New York* is officially reported in 82 App. Div. 584.

**961** n. 180. Merely pleading want of jurisdiction of the person is a conclusion. *Bushansky v. Lantinberg*, 84 Misc. 37, 145 N. Y. Supp. 898.

**961** § 867. Complete defense is good on demurrer although pleaded as a partial defense. *H. G. Vogel Co. v. Wolff*, 156 App. Div. 584, 141 N. Y. Supp. 756 [aff. in 209 N. Y. 568, 103 N. E. 1124]. Partial defense is good if it can be urged against either of the causes of action in the complaint. *Hart v. Goodby*, 72 Misc. 232, 129 N. Y. Supp. 892. Facts tending to show plaintiff not entitled to injunctive relief may be pleaded as a partial defense. *Raymond v. Transit Development Co.*, 65 Misc. 70, 119 N. Y. Supp. 665.

**961** n. 181. A paragraph in an answer repeating as a partial defense that which was in fact a complete defense if true, and which had been previously alleged as a complete defense is demurrable. *Shattuck v. Guardian Trust Co.*, 125 App. Div. 431, 109 N. Y. Supp. 862.

**961** n. 182. Precise language of statute need not be used. *Blumlein v. Phenix Ins. Co.*, 3 Current Ct. Dec. 69. Partial defense must not be pleaded as complete defense. *Block v. Nussbaum*, 160 App. Div. 678, 146 N. Y. Supp. 55. Partial defenses are not limited to the actions enumerated. *Gabay v. Doane*, 77 App. Div. 413, 79 N. Y. Supp. 312. This Code section was not intended to apply to an action in equity asking for discretionary relief, where a defendant sets up facts which he will ask the court to consider in determining the relief to be granted. *Straus v. American Publishers' Ass'n*, 103 App. Div. 277, 92 N. Y. Supp. 1052.



**961** n. 183. *Nunnally v. New Yorker Zeitung Pub. & P. Co.*, 117 App. Div. 1, 101 N. Y. Supp. 1041; *Nunnally v. Mail & Express Co.*, 113 App. Div. 831, 99 N. Y. Supp. 647.

**961** n. 184. *Leavitt v. O'Rourke Eng. Const. Co.*, 160 App. Div. 869; *Browning King & Co. v. Terwilliger*, 144 App. Div. 516, 129 N. Y. Supp. 431; *Price v. Derbyshire Coffee Co.*, 128 App. Div. 472, 112 N. Y. Supp. 830; *Thistle v. Jones*, 123 App. Div. 40, 107 N. Y. Supp. 840; *Murphy v. Eidlitz*, 113 App. Div. 659, 99 N. Y. Supp. 950; *Mott v. De Nisco*, 106 App. Div. 154, 94 N. Y. Supp. 380. As affected by denials reiterated in defense, see *Browning v. New York Leasing Co.*, 110 N. Y. Supp. 928.

**962.** In an action to recover for services, the defense that it had been agreed that a sum to be fixed by defendant should be received in satisfaction of the services, but that plaintiff had refused to accept the sum as fixed, is a partial defense, where there was no tender nor was the money brought into court. *Butler v. General Acc. Assur. Corp.*, 103 App. Div. 273, 92 N. Y. Supp. 1025. A separate defense, in an equitable suit alleging facts which existed at the time the pleading was made, though interposed after a determination on appeal of a demurrer to the complaint, need not be pleaded as a partial defense. *Straus v. American Publishers' Ass'n*, 45 Misc. 251, 92 N. Y. Supp. 153.

**962** n. 188. *Browning King & Co. v. Terwilliger*, 144 App. Div. 516, 129 N. Y. Supp. 431.

**963** n. 192. *Allen v. Besecker*, 55 Misc. 366, 105 N. Y. Supp. 416. See *Whalen v. Union Bag & Paper Co.*, 130 App. Div. 313, 114 N. Y. Supp. 220. In libel action. *Osterheld v. Star Co.*, 146 App. Div. 388, 131 N. Y. Supp. 247.

**964** § 868. Where answer served in compliance with an order requiring separate statement of defenses, unites two in a single defense, the remedy is to move to strike it out. *Burlingham v. Gargan*, 125 N. Y. Supp. 565.

**964** n. 204. Satisfaction of note and statute of limitations. *Hoover v. Hubbard*, 202 N. Y. 289, 95 N. E. 702.

**965.** Designating matter in an answer as a fifth and further "answer" instead of "defense" is too trivial a defect to be considered. *Gibson v. McDonald*, 139 App. Div. 51, 123 N. Y. Supp. 504.

**965** n. 210. *Brckett v. Ostrander*, 126 App. Div. 529, 110 N. Y. Supp. 779; *Walsh v. Lispenard Realty Co.*, 55 Misc. 400, 106 N. Y. Supp. 570; *Biedler v. Malcolm*, 121 App. Div. 145, 105 N. Y. Supp. 642; *Outcalt v. Bonheur*, 120 App. Div. 168, 104 N. Y. Supp. 1099; *Mott v. De Nisco*, 106 App. Div. 154, 94 N. Y. Supp. 380; *Singer v. Abrams*, 47 Misc. 360, 94 N. Y. Supp. 7; *Barnard v. Lawyers' Title Ins. Co.*, 45 Misc. 577, 91 N. Y. Supp. 41; *Royal Bank of N. Y. v. Goldschmidt*, 51 Misc. 622, 101 N. Y. Supp. 101. Rule applied to denials in another part of answer. *Mendelson v. Margulies*, 157 App. Div. 666, 142 N. Y. Supp. 825; *Cunningham v. Platt*, 82 Misc. 486, 144 N. Y. Supp. 51. It is sufficient to "reallege all that he has hereinbefore alleged." *Stemmerman v. Kelly*, 122 App. Div. 669, 107 N. Y. Supp. 379. Not sufficient where, by mistake, paragraphs of complaint instead of answer are referred to. *Aetna Life Ins. Co. v. North Star Mines Co.*, 55 Misc. 402, 106 N. Y. Supp. 545.

**965** n. 211. See *Wiener v. Boehm*, 126 App. Div. 703, 111 N. Y. Supp. 126.

**968.** Not precluded by fact that counterclaim is triable in one branch of the court and the complaint in another. *Stevenson v. Devins*, 158 App. Div. 616, 143 N. Y. Supp. 916. Calling a counterclaim a set-off does not make it so. *S. Liebmann's Sons Brewing Co. v. De Nicolo*, 91 N. Y. Supp. 791.

**970** n. 232. *Assets Realization Co. v. Buffalo*, 118 App. Div. 571, 103 N. Y. Supp. 153.

**971** § 873. In an action by a wife against her husband to

recover sums expended for maintenance of their child, defendant cannot set up as a counterclaim that a separation agreement was intended to include the support of the child and ask for a reformation of it on the ground of mutual mistake. *Johnson v. Johnson*, 157 App. Div. 289, 142 N. Y. Supp. 416. In replevin, defendant cannot counterclaim on the ground that the goods were delivered as security and demand a foreclosure of the lien thereon and judgment for sums due from the plaintiff. *Scognamillo v. Passarelli*, 157 App. Div. 428, 142 N. Y. Supp. 382. In an action against a contractor for material furnished, sums paid by defendant under a contract to which plaintiff was not a party cannot be set up as a counterclaim. *Eagle Iron Works v. Mader*, 139 App. Div. 717, 124 N. Y. Supp. 378. A possible but unestablished liability which is unliquidated in amount cannot be set up against a liquidated legal claim that is due and payable. *Dunn v. Uvalde Asphalt Pav. Co.*, 175 N. Y. 214, 67 N. E. 439.

**971** n. 238. The claim must have existed at the time of the commencement of the action. *Quayle & Sons v. Brandow Printing Co.*, 116 App. Div. 9, 101 N. Y. Supp. 323.

**971** n. 244. *Rogers v. Kelsey*, 105 N. Y. Supp. 119. Only where counterclaim based on subd. 2 of § 501 of the Code. *Caspary v. Hatch*, 157 App. Div. 679, 142 N. Y. Supp. 785.

**972.** Pleading a judgment in bar does not preclude its also being pleaded as a set-off. *Berg v. Bates*, 153 App. Div. 12, 137 N. Y. Supp. 1022.

**972** n. 245. *Cunningham v. Platt*, 82 Misc. 486, 144 N. Y. Supp. 51. But this rule does not prevent defendant from denying its liability or default on a contract and then set up as a counterclaim the default of the plaintiff. *Hudson River P. T. Co. v. United Traction Co.*, 43 Misc. 205, 88 N. Y. Supp. 448.

**972** n. 248. *Fliess v. Hoy*, 150 App. Div. 555, 135 N. Y. Supp. 44; *Williams v. Clarke*, 82 App. Div. 199, 81 N. Y.

Supp. 381. See also *Hudson River P. T. Co. v. United Traction Co.*, 98 App. Div. 568, 91 N. Y. Supp. 179. Rule applied in replevin suit. *Spaus v. Stolwein*, 75 Misc. 1, 134 N. Y. Supp. 603. Hence in replevin a counterclaim for damages is improper. *Spaus v. Stolwein*, 75 Misc. 1, 134 N. Y. Supp. 603.

**973.** Where, in an action on a money obligation, a counterclaim is allowed in favor of one of several defendants, it enures to the benefit of all the defendants liable on that obligation. *American Guild v. Damon*, 186 N. Y. 360, 78 N. E. 1081.

**973 n. 257.** In *American Guild v. Damon*, 186 N. Y. 360, 78 N. E. 1081, it is said that the rule of the Revised Statutes still obtains where the suit is on the joint obligation or liability of the defendants.

**974 n. 259.** This rule applies to an action to foreclose a mortgage and recover a deficiency judgment against both defendants. *American Guild v. Damon*, 186 N. Y. 360, 78 N. E. 1081, holding, in addition, that the action is in form joint is immaterial. One of several joint defendants in an action to foreclose a mechanic's lien may, by separate answer, interpose a counterclaim arising from a contract between plaintiff and such defendant. *Valett v. Baker*, 129 App. Div. 514, 114 N. Y. Supp. 214.

**974 n. 260.** *Thomas v. Noonan*, 133 App. Div. 459, 118 N. Y. Supp. 25. In an action against a firm, one partner cannot set up a personal claim as a counterclaim. *Hunter v. Booth*, 84 App. Div. 585, 82 N. Y. Supp. 1000.

**975 § 874.** "Some of the authorities hold that these provisions of the Code of Civil Procedure and the corresponding provisions of the Code of Procedure were designed to prescribe a *reciprocal* rule, and that where a counterclaim is properly pleaded, the cause of action to which it is pleaded might be pleaded as a counterclaim, if the defendant had

brought the action. (Adams v. Schwartz, 137 App. Div. 230, 235, and cases cited.)” Stevenson v. Devins, 158 App. Div. 616, 143 N. Y. Supp. 916. In action to recover sums expended in paying judgments, etc., counterclaims held not to arise out of same transaction nor to be connected with the subject of the action. Fulton County Gas, etc., Co. v. Hudson River Tel. Co., 200 N. Y. 287, 93 N. E. 1052. Claim accruing after action commenced may be set up as a counterclaim under this provision. Caspary v. Hatch, 157 App. Div. 679, 142 N. Y. Supp. 785. A counterclaim by individuals for legal services held not proper in action by stockholder to preserve assets. Baum v. Sporborg, 146 App. Div. 537, 131 N. Y. Supp. 267. In replevin, where it is alleged that plaintiff delivered chattels to defendant to sell and remit the proceeds and to return if not sold, and defendant, not having made a sale and refusing to return on demand on the ground that the chattels were delivered to him as security, a counterclaim for a foreclosure of the lien upon the chattels is proper. Scognamillo v. Passarelli, 210 N. Y. 24 (mem.). 105 N. E. 199 [rev. on this point 157 App. Div. 428, 142 N. Y. Supp. 382]. In replevin, counterclaim for breach of agreement held to arise out of same transaction. Adenaw v. Piffard, 137 App. Div. 470, 121 N. Y. Supp. 825. In action to recover possession of personal property, counterclaim based on breach of agreement by testatrix that property should belong to defendants on her death, arose out of the same transaction. Adenaw v. Piffard, 137 App. Div. 470, 121 N. Y. Supp. 825. In replevin, see also H. G. Vogel Co. v. Wolff, 156 App. Div. 584, 141 N. Y. Supp. 756. Reformation of contract may be set up as a counterclaim in an action based on the contract. National Gun & Mica Co. v. MacCormack, 124 App. Div. 569, 109 N. Y. Supp. 286. In an action for dower in land conveyed by the husband by a deed in which the wife did not join, a counterclaim cannot be set up for damages for

the amount of such dower interest, though the wife is the sole legatee and devisee. *Burnett v. Burnett*, 86 App. Div. 386, 83 N. Y. Supp. 760. Propriety of counterclaim in action to foreclose mortgage against property of deceased mortgagor, see *Fort Miller Pulp & Paper Co. v. Bratt*, 119 App. Div. 685, 104 N. Y. Supp. 350. In action to foreclose mechanic's lien, see *Uvalde Asphalt Pav. Co. v. Morgan Contracting Co.*, 120 App. Div. 498, 104 N. Y. Supp. 1118.

**975** n. 264. *Bloomgarden v. Hoffman*, 116 App. Div. 719, 102 N. Y. Supp. 20.

**976**. In action for breach of promise of marriage, cause of action for damages for fraud in inducing the making of the contract arises out of the same transaction. *Gross v. Hochstim*, 72 Misc. 343, 130 N. Y. Supp. 315.

**976** n. 268. *Weiss v. Rosenbaum*, 115 N. Y. Supp. 121; *Quayle & Sons v. Brandow Printing Co.*, 116 App. Div. 9, 101 N. Y. Supp. 323; *Lundine v. Callaghan*, 82 App. Div. 621, 626, 81 N. Y. Supp. 1052; *George A. Fuller Co. v. Manhattan Const. Co.*, 44 Misc. 219, 88 N. Y. Supp. 1049. In an action on notes given in payment for stock of a corporation, defendant cannot set up a counterclaim for damages from misrepresentations as to the financial condition of the corporation. *Story v. Richardson*, 91 App. Div. 381, 86 N. Y. Supp. 843.

**976** n. 269. Cannot set up forcible exclusion and detainer of the premises. *Safran v. Silverman*, 72 Misc. 14, 129 N. Y. Supp. 116.

**976** n. 270. *Kneeland v. Pennell*, 49 Misc. 94, 96 N. Y. Supp. 403.

**977** n. 271. See *Carroll v. Sharp*, 67 Misc. 254, 122 N. Y. Supp. 694.

**977** n. 275. *McIntyre v. Smathers*, 118 App. Div. 776, 103 N. Y. Supp. 873. In an action *ex delicto* to recover for the conversion of rents collected by defendant as the agent

of plaintiff, a counterclaim is not allowable which sets up a demand for the use and occupation of premises let by defendant to plaintiff. *Frick v. Freudenthal*, 45 Misc. 348, 90 N. Y. Supp. 344.

977 n. 276. *Vandervort v. Mink*, 113 App. Div. 601, 98 N. Y. Supp. 772; *Harrington v. Jackel*, 75 Misc. 653, 133 N. Y. Supp. 933. Rule applied in action for conversion. *Waters v. Lang*, 79 Misc. 240, 139 N. Y. Supp. 844. Judgment as counterclaim in action for conversion, see *Rando v. Natl. Park Bank*, 3 Current Ct. Dec. 102. In an action for conversion of money, a counterclaim to recover margins deposited to secure a purchase of stock ordered but not purchased is proper. *O'Brien v. Dwyer*, 76 App. Div. 516, 78 N. Y. Supp. 600.

977 n. 277. *Benton v. Moore*, 42 Misc. 660, 87 N. Y. Supp. 717.

977 n. 280. Action for false arrest and malicious prosecution; counterclaim for trespass on the realty held not to grow out of the same transaction. *Adams v. Schwartz*, 137 App. Div. 230, 122 N. Y. Supp. 41; *Pettis v. Schwartz*, 137 App. Div. 242, 122 N. Y. Supp. 50.

977 n. 281. In injunction suit, trespass held proper counterclaim. *Kelly v. Webster*, 143 App. Div. 737, 128 N. Y. Supp. 58.

979 n. 291. See also *Hessberg v. Matter*, 64 Misc. 97, 117 N. Y. Supp. 1014.

979 n. 292. An executor sued to compel the payment of a general legacy cannot counterclaim a conversion of assets the executor had reduced to possession. *Lehleuter v. Schano*, 49 Misc. 99, 96 N. Y. Supp. 716. In action to annul a contract on the ground of fraud, a counterclaim for moneys due under the contract is proper. *Stevenson v. Devius*, 158 App. Div. 616, 143 N. Y. Supp. 916.

979 n. 296. This definition of Mr. Pomeroy's is adopted in *Steinmetz v. Cosmopolitan Range Co.*, 47 Misc. 611,

94 N. Y. Supp. 456. See *Van v. Madden*, 132 App. Div. 535, 116 N. Y. Supp. 1115.

980 n. 298. *Fliess v. Hoy*, 150 App. Div. 555, 135 N. Y. Supp. 440. See also *Fulton County Gas & Electric Co. v. Hudson River Telephone Co.*, 60 Misc. 247, 113 N. Y. Supp. 22.

980 § 875. Judgment may be pleaded as a counterclaim. *Feinstien v. Jacobs*, 139 App. Div. 192, 123 N. Y. Supp. 750. A judgment for costs may be set up as a counterclaim in an action on a contract. *Braun v. Finger*, 113 N. Y. Supp. 573.

980 n. 300. *Jacobowitz v. Strasbourger*, 108 N. Y. Supp. 698. An action by a village to recover a tax is not an action on contract within this provision, since it is the substance of the cause of action rather than the form of the action which governs. *Charlotte v. Keon*, 207 N. Y. 346, 100 N. E. 1116 [rev. 143 App. Div. 952, 128 N. Y. Supp. 80].

980 n. 305. *Knight v. Rothschild*, 132 App. Div. 274, 117 N. Y. Supp. 26. See also *Hoeffe v. American Laundry Machinery Mfg. Co.*, 161 App. Div. 679, 146 N. Y. Supp. 621. Another judgment may be set up as a counterclaim. *Wyckoff v. Williams*, 136 App. Div. 495, 121 N. Y. Supp. 189.

982 n. 314. *Siebert v. Dunn*, 157 App. Div. 387, 142 N. Y. Supp. 253. See also *Bayne v. Hard*, 77 App. Div. 251, 79 N. Y. Supp. 208. Subdivision 2 does not require the defense of breach of warranty to be pleaded as a counterclaim in an action on a note given for merchandise and assigned to plaintiff. *American Seeding Mach. Co. v. Slocum*, 58 Misc. 458, 108 N. Y. Supp. 1042. Demand must have existed against the assignee at the time of the assignment. *Seibert v. Dunn*, 70 Misc. 422, 126 N. Y. Supp. 974.

982 n. 315. *Courtright v. Vreeland*, 64 Misc. 46, 117 N. Y. Supp. 952; *Knight v. Rothschild*, 132 App. Div. 274, 117 N. Y. Supp. 26; *D'Amelio v. Abraham*, 54 Misc. 386, 105



N. Y. Supp. 1019. See also *Silver v. Krellman*, 89 App. Div. 363, 85 N. Y. Supp. 945.

982 n. 316. See also *Hunter v. Fiss*, 92 App. Div. 164, 86 N. Y. Supp. 1131.

982 n. 317. Action must be brought by person as assignee or representative. *Knight v. Rothschild*, 117 N. Y. Supp. 26.

983 n. 322. *Fort Miller Pulp & Paper Co. v. Bratt*, 119 App. Div. 685, 104 N. Y. Supp. 350.

983 § 880. A set-off can be pleaded only by way of counterclaim. *Barber v. Ellingwood*, No. 2, 137 App. Div. 704, 122 N. Y. Supp. 369.

984. Facts may be pleaded as a counterclaim for purpose of using them as a set-off. *Knickerbocker Trust Co. v. Condon*, 147 App. Div. 871, 133 N. Y. Supp. 95. Recoupment, set-off and counterclaims must all be pleaded as counterclaims rather than as defenses. *Seibert v. Dunn*, 70 Misc. 422, 126 N. Y. Supp. 974, 2 Civ. Pro. (N. S.) 273. A counterclaim must be treated as a separate plea, and upon demurrer thereto the defendant is not even entitled to the benefit of denials made elsewhere in the answer, unless incorporated in the separate plea by reiteration or appropriate reference. *Blaut v. Blaut*, 41 Misc. 572, 85 N. Y. Supp. 146; *Gray Lithograph Co. v. American Watchman's Time Detector Co.*, 44 Misc. 206, 88 N. Y. Supp. 857; *Goldberg v. Wood*, 45 Misc. 327, 90 N. Y. Supp. 427.

984 n. 326. *Wise v. Wise*, 159 App. Div. 575, 144 N. Y. Supp. 649; *Richard Dreeves & Son v. Manhattan Life Ins. Co.*, 195 N. Y. 324, 88 N. E. 395 [affirming mem. decision in 122 App. Div. 888, 106 N. Y. Supp. 1142].

984 n. 327. Usury pleaded both as defense and counterclaim held a counterclaim. *Loew v. McInerney*, 159 App. Div. 513, 144 N. Y. Supp. 546.

984 n. 328. *Knickerbocker Trust Co. v. Condon*, 147 App. Div. 871, 133 N. Y. Supp. 95; *National Gum & Mica*

Co. v. MacCormack, 124 App. Div. 569, 109 N. Y. Supp.; 286; Shotland v. Mulligan, 60 Misc. 58, 111 N. Y. Supp. 642. Mason v. Mason, 46 Misc. 361, 94 N. Y. Supp. 868.

984 n. 329. Ortiz v. Cornell, 116 N. Y. Supp. 89; Wilmerding v. Strouse, 112 N. Y. Supp. 1091; Gilsey v. Keen, 104 App. Div. 427, 93 N. Y. Supp. 783. See also Prosser v. Maxon, 52 Misc. 18, 100 N. Y. Supp. 815; Huber Brewery v. Sieke, 146 App. Div. 467, 131 N. Y. Supp. 271. So if defendant defines it as a counterclaim he cannot insist on its sufficiency as a defense. Rogers v. Morton, 46 Misc. 494, 95 N. Y. Supp. 49. Election to stand on answer as a defense, see Thalmann v. Lewis, 121 App. Div. 836, 106 N. Y. Supp. 1056.

985. Counterclaim must be complete in itself. Aetna Life Ins. Co. v. North Star Mines Co., 56 Misc. 164, 107 N. Y. Supp. 140.

985 n. 333. See Clinton v. Boehm, 139 App. Div. 73, 124 N. Y. Supp. 789; Fuller v. Queens Land & Title Co., 79 Misc. 617, 140 N. Y. Supp. 574; Engel v. Georgiades, 140 N. Y. Supp. 93.

985 n. 334. American Ink Co. v. Riegel Sack Co., 79 Misc. 421, 140 N. Y. Supp. 107.

985 n. 343. "A counterclaim must have belonged to the defendant at the commencement of the action." Starks v. Rhodes, 64 Misc. 13, 118 N. Y. Supp. 799, 800.

## CHAPTER IV

### THE REPLY

987 § 882. The amendment in 1910 to Rule 24 of the General Rules of Practice makes the provision therein as to extension of time to answer applicable to an extension of time to reply to a counterclaim, and it provides that the affidavit shall also state the cause of action and the relief

demand in the complaint and, where a counterclaim has been interposed, the cause of action alleged as a counterclaim and the relief demanded in the answer; and whether any and what extension or extensions of time to demur or reply by stipulation or order have been granted. Motion to extend time to serve reply as proper remedy, see *Joseph v. Herzig*, 156 App. Div. 809, 142 N. Y. Supp. 36.

**987** § 883. Set-off need not be replied to. *Young v. Stillwater Crushed Stone Co.*, 153 App. Div. 453, 138 N. Y. Supp. 539.

**987** n. 4. But mere designation of plea as a counterclaim does not make it such, so as to require a reply. *McGee v. Felter*, 75 Misc. 349, 135 N. Y. Supp. 267.

**988** n. 5. *Brooklyn Heights, etc., Co. v. Brooklyn City, etc., Co.*, 151 App. Div. 465, 135 N. Y. Supp. 990; *Jenkins v. Bishop*, 62 Misc. 87, 115 N. Y. Supp. 1011; *Reno v. Thompson*, 111 App. Div. 316, 97 N. Y. Supp. 744; *Babcock v. Clark*, 93 App. Div. 119, 121, 86 N. Y. Supp. 976; *Spier v. Hyde*, 78 App. Div. 151, 157, 79 N. Y. Supp. 699.

**988** n. 6. *American Guild v. Damon*, 186 N. Y. 360, 78 N. E. 1081; *Young v. Stillwater Crushed Stone Co.*, 153 App. Div. 453, 138 N. Y. Supp. 539.

**988** n. 8. *Rose v. White Plains*, 146 App. Div. 470, 131 N. Y. Supp. 334 [citing *Nichols' Pr.*].

**988** § 884. Illustrations of reply ordered, see *Schweitzer v. Hamburg-Amerikanische, etc.*, 149 App. Div. 900, 134 N. Y. Supp. 812. Reply ordered to defense of fraud. *Eagle Waist Co. v. Ocean Accident, etc., Corp.*, 133 N. Y. Supp. 1031. Will be compelled to reply to a plea of the statute of frauds. *Guinzburg v. Joseph*, 141 App. Div. 472, 126 N. Y. Supp. 324. May require a reply to defenses set up in an action on an insurance policy. *Smith v. Metropolitan Life Ins. Co.*, 79 Misc. 550, 140 N. Y. Supp. 327. Should require reply to defense of breach of warranty in action on a policy of burglar insurance. *Vanta v. Massachusetts Bonding & Ins. Co.*,

158 App. Div. 502, 143 N. Y. Supp. 705. In action on burglar insurance policy, plaintiff required to reply to defenses of breach of warranty and fraudulent exaggeration of the claim but not to defenses of breaches of conditions precedent. *Shaff v. United Surety Co.*, 142 App. Div. 465, 127 N. Y. Supp. 8. If defense merely equivalent to a denial of an allegation of performance, a reply will not be ordered. *Eagle Waist Co. v. Ocean Accident, etc., Corp.*, 133 N. Y. Supp. 1031. Refused to defense that decree plaintiff relies on was made without jurisdiction. *City Equity Co. v. Bodine*, 141 App. Div. 907, 126 N. Y. Supp. 439. Order requiring reply is not an adjudication of the sufficiency of the defense. *Humboldt Exploration Co. v. Fritsch*, 150 App. Div. 90, 134 N. Y. Supp. 747.

988 n. 10. *Vanta v. Massachusetts Bonding Ins. Co.*, 158 App. Div. 592, 143 N. Y. Supp. 705; *Richards v. Grea-son*, 128 App. Div. 320, 112 N. Y. Supp. 675. A reply may be required to a defense, it seems, where it may result in a final disposition of the case on a motion for judgment on the pleadings. *Lincoln Trust Co. v. McVicker*, 68 Misc. 132, 123 N. Y. Supp. 723. Not ordered when new matter in answer is admissible under a general denial. *Fragner v. Fischel*, 141 App. Div. 869, 126 N. Y. Supp. 478.

988 n. 11. The discretion is usually exercised in favor of the moving party. *Seaton v. Garrison*, 116 App. Div. 301, 101 N. Y. Supp. 526.

988 n. 12. Discretion will not be interfered with except in case of clear error. *Porter v. American Tobacco Co.*, 140 App. Div. 871, 125 N. Y. Supp. 710.

989. A reply will not be compelled where the answer merely contains statements denying what the plaintiff must prove in order to succeed. *Burr v. Union Surety & Guaranty Co.*, 86 App. Div. 545, 83 N. Y. Supp. 756. But a reply is properly ordered in ejectment where defendant alleges title by purchase at foreclosure sale, in order to en-

able defendant to prepare for trial. *Timble v. Russell*, 41 Misc. 577, 85 N. Y. Supp. 109.

989 n. 13. It is only where the substantial ends of justice will be promoted thereby that the service of a reply will be compelled. *Hallenborg v. Greene*, 87 App. Div. 259, 84 N. Y. Supp. 319; *Hope Mfg. Co. v. Rubber Goods Mfg. Co.*, 100 App. Div. 514, 91 N. Y. Supp. 831. Object of requiring a reply is to avoid the necessity of proving the facts alleged, if admitted, or to compel plaintiff to allege any new facts in avoidance. *Humboldt Exploration Co. v. Fritsch*, 150 App. Div. 90, 134 N. Y. Supp. 747. Denial of motion held erroneous exercise of discretion on ground that it would prevent surprise. *Weglein v. Trow, etc., Co.*, 152 App. Div. 705, 137 N. Y. Supp. 556. Order granted in action to determine the validity of a will. *Twamley v. McKennell*, 137 App. Div. 574, 122 N. Y. Supp. 237.

990 n. 21. Applied where foreign statute of limitations pleaded. *Olsen v. Singer Manufacturing Co.*, 138 App. Div. 467, 122 N. Y. Supp. 822. Refused where six-year statute pleaded but twenty-year statute applied. *City Equity Co. v. Bodine*, 141 App. Div. 907, 126 N. Y. Supp. 439.

990 n. 22. *Continental Securities Co. v. Belmont*, 130 N. Y. Supp. 792.

990 § 885. A reply to new matter not a counterclaim need not be received, where a reply is not directed by the court. *Davis Confectionery Co., Inc., v. Rochester German Ins. Co.*, 141 App. Div. 909, 126 N. Y. Supp. 723.

990 § 886. Reply is not bad because it makes use of same faulty numerical designation of defenses as does the answer. *Smith v. Metropolitan Life Ins. Co.*, 79 Misc. 550, 140 N. Y. Supp. 327. May deny on information and belief the defense of statute of limitations of a sister state. *Olsen v. Singer Mfg. Co.*, 151 App. Div. 516, 135 N. Y. Supp. 872. A partial defense must be pleaded as such. *Pope Mfg. Co. v. Rubber Goods Mfg. Co.*, 110 App. Div. 341, 97 N. Y.

Supp. 73. A reply merely explaining the allegations of the complaint is insufficient. *Citizens' Permanent Savings & Loan Ass'n v. Rampe*, 116 N. Y. Supp. 597.

990 n. 26. The phrase "in ordinary and concise language, without repetition" was changed by Laws 1904, c. 500, to "clear, precise and unequivocal language," but was again changed to its original form by Laws 1905, c. 431. A reply was, in part, as follows: "49. Plaintiff reiterates the allegations and denials contained in paragraphs 1, 5, 6, 7, 8, 9, 10 and 11 of this reply," etc. "50. It admits the allegations contained in the articles or paragraphs of the answer designated as (32), (47), (48), (103), (104), (105), (106), (107) and (109)." "51. It denies each and every allegation contained in the articles or paragraphs of the answer designated as (14), (20), (21), (25), (26), (27), (28), (30), (136) and (138)." It was held to violate the Code rule requiring the matter averred to be stated in clear and concise language. *Pope Mfg. Co. v. Rubber Goods Mfg. Co.*, 100 App. Div. 349, 91 N. Y. Supp. 828. Sufficiency as to release set up in answer, see *Stiebel v. Grosberg*, 202 N. Y. 266, 95 N. E. 692.

991. The reply cannot contain a counterclaim to a counterclaim set up in answer, but plaintiff must seek relief by an amendment to his complaint. *Fett v. Greenstein*, 92 N. Y. Supp. 736.

991 n. 29. Followed in *Perry v. Levenson*, 82 App. Div. 94, 101, 81 N. Y. Supp. 586.

991 n. 34. *Anderson v. Smitley*, No. 1, 141 App. Div. 421, 126 N. Y. Supp. 25.

991 n. 35. Averments of matter contained in the reply, if inconsistent with the complaint, cannot be availed of by the plaintiff as a part of its affirmative cause of action. *Pope Mfg. Co. v. Rubber Goods Mfg. Co.*, 100 App. Div. 349, 91 N. Y. Supp. 828.

992 § 888. Admits the facts without waiving objections to their legal sufficiency. *Humboldt Exploration Co. v.*

Fritsch, 150 App. Div. 90, 134 N. Y. Supp. 747. Failure to reply authorizes a motion for judgment on a counterclaim although it is pleaded as "a separate and distinct defense and counterclaim." *Loew v. McInerny*, 159 App. Div. 513, 144 N. Y. Supp. 546. Amount of counterclaim not replied to may be set off against plaintiff's recovery. *Norton v. Kull*, 74 Misc. 476, 132 N. Y. Supp. 387. A motion for judgment on a counterclaim because of failure to reply thereto will be denied as premature where, until the issues have been tried, it cannot be determined whether defendant's claim is a mere offset. *Walter v. Carroll*, 140 N. Y. Supp. 868. Independent judgment on counterclaim should not be entered, where complaint stands. *Crompton v. Seaich*, 142 App. Div. 431, 126 N. Y. Supp. 817.

992 n. 37. *Flynn v. Smith*, 111 App. Div. 870, 98 N. Y. Supp. 56 (holding, however, that where defendant did not rest upon his exception but offered proof of the facts, the appellate court should not direct final judgment on the counterclaim). Where complaint has been dismissed, motion for judgment on counterclaim not pleaded to may be granted. *Crompton v. Seaich*, 143 App. Div. 284, 128 N. Y. Supp. 586.

## CHAPTER V

### DEMURRERS

994 n. 8. *Akers v. Mutual Life Ins. Co. of New York*, 59 Misc. 273, 112 N. Y. Supp. 254. Defect of parties. *Curtis v. Curtis*, 126 App. Div. 590, 110 N. Y. Supp. 658. Cannot refer to date of summons or verification. *Belanewsky v. Gallaher*, 55 Misc. 150, 105 N. Y. Supp. 77.

995 § 890. Cannot demur after answer but may move to dismiss the complaint for failure to state cause of action. *Crowley v. LaBrake*, 147 App. Div. 389, 132 N. Y. Supp. 155.

**995 n. 16.** Failure to add to the statement of the representative character of the defendants the words "as trustees" in addition to the words "as executors," is not a sufficient reason for sustaining a demurrer to the complaint, especially where the complaint contains a copy of the will, and further allegations show that as executors the defendants have accepted the trusts created by the will. *Rowe v. Rowe*, 103 App. Div. 100, 92 N. Y. Supp. 491.

**996 § 892.** Code grounds are inclusive. *Mildeberger v. Franklin*, 130 App. Div. 860, 115 N. Y. Supp. 903. Unconstitutionality of statute under which the action is brought may be urged by demurrer. *Duffy v. Shirden*, 139 App. Div. 755, 124 N. Y. Supp. 529.

**996 n. 19.** Not ground to urge improper service or absence of property of foreign corporation in the state. *Heney v. Chartered Co.*, 71 Misc. 237, 128 N. Y. Supp. 436.

**997 n. 23.** See also ante, **135 n. 192**. See *Howe v. N. Y., New Haven, etc., R. Co.*, 142 App. Div. 451, 126 N. Y. Supp. 1090.

**997 n. 24.** Independent T. Y. M. B. Ass'n v. Somach, 52 Misc. 538, 102 N. Y. Supp. 495. See *Moore v. Flagg*, 137 App. Div. 338, 122 N. Y. Supp. 174. So held where the action was against a foreign corporation and the complaint contained no allegations as to where plaintiff resided. *Herbert v. Montana Diamond Co.*, 81 App. Div. 212, 80 N. Y. Supp. 717. A complaint in an action by a partnership brought in a company name is demurrable on this ground. *Union Wine Co. v. Green*, 62 Misc. 551, 115 N. Y. Supp. 921.

**997 n. 28.** See also *Rinehart v. Haseo Bldg. Co.*, 153 App. Div. 153, 138 N. Y. Supp. 258.

**998 n. 33.** "Proceeding" is not necessarily an "action." *Queens County Water Co. v. O'Brien*, 131 App. Div. 91, 115 N. Y. Supp. 495.

**998 n. 36.** *Tew v. Wolfsohn*, 77 App. Div. 454, 79 N. Y.



Supp. 286; *Hall v. Gilman*, 77 App. Div. 458, 464, 79 N. Y. Supp. 303, 307; *Kramer v. Barth*, 79 Misc. 80, 139 N. Y. Supp. 341. A demurrer does not lie for multifariousness. *Id.* Misjoinder of plaintiffs is ground. *Clarkson v. Walpole Rubber Co.*, 156 App. Div. 869, 142 N. Y. Supp. 502.

998 n. 37. Is properly raised by demurrer where it appears on face of complaint, and if not so urged is waived. *Dickinson v. Tysen*, 125 App. Div. 735, 110 N. Y. Supp. 269. Defect of parties plaintiff as ground, see *Natter v. Isaac H. Blanchard Co.*, 153 App. Div. 814, 138 N. Y. Supp. 969; *Rinehart v. Hasco Bldg. Co.*, 153 App. Div. 153, 138 N. Y. Supp. 258. Defect of parties defendant as ground, see *Hevia v. Wheelock*, 155 App. Div. 387, 140 N. Y. Supp. 351.

998 n. 38. *Duffy v. Shirden*, 139 App. Div. 755, 124 N. Y. Supp. 529. This rule also applies where the defect is set up by answer. *Shanks v. National Casket Co.*, 95 App. Div. 187, 88 N. Y. Supp. 839. A prayer for relief against persons not made parties, where their presence is not necessary to a complete determination of the controversy, may be deemed surplusage, and a failure to join them as defendants is not ground of demurrer. *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 46, 76 N. E. 1082.

999 n. 41. A demurrer on ground of defect of parties properly raises the objection as to the right of plaintiff to sue individually on a joint demand. *Weinfeld v. Fr. Bergner & Co.*, 114 N. Y. Supp. 284.

999 n. 44. The objection that the causes of action joined require different places of trial cannot be raised by demurrer. *Todaro v. Somerville Realty Co.*, 138 App. Div. 1, 122 N. Y. Supp. 509. Fact that one of two causes of action pleaded is demurrable does not authorize a demurrer for misjoinder. *Todaro v. Somerville Realty Co.*, 138 App. Div. 1, 122 N. Y. Supp. 509. Those affected by all of the causes of action, as well as those affected by only one or more, may demur.

*People v. Equitable Life Assur. Soc.*, 124 App. Div. 714, 109 N. Y. Supp. 453. A denial of a motion to separately state and number two causes of action, on the ground that there is but one cause of action, does not prevent the raising of the question of misjoinder by demurrer. *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 46, 76 N. E. 1082 [reversing 107 App. Div. 630, 95 N. Y. Supp. 1149, which affirmed 45 Misc. 228, 92 N. Y. Supp. 161].

999 n. 45. *Reed v. Livermore*, 101 App. Div. 254, 91 N. Y. Supp. 986. A demurrer for misjoinder is proper, where there is only a single count, without first moving to compel the causes of action to be separately stated. *Edison Electric Illuminating Co. v. Franklin H. Kalbfleisch Co.*, 111 N. Y. Supp. 462; *Powers v. Sherin*, 89 App. Div. 37, 85 N. Y. Supp. 89. But see *Whitney v. Wenman*, 96 App. Div. 290, 293, 89 N. Y. Supp. 296. On demurring for misjoinder of causes of action, the form of the complaint does not control the question whether there is in fact more than one cause of action stated. *Todaro v. Somerville Realty Co.*, 138 App. Div. 1, 122 N. Y. Supp. 509.

999 n. 47. *Sartori v. Litchfield Constr. Co.*, 149 App. Div. 241, 133 N. Y. Supp. 720.

999 n. 49. *Todaro v. Somerville Realty Co.*, 138 App. Div. 1, 122 N. Y. Supp. 509; *People v. Equitable Life Assur. Soc.*, 124 App. Div. 714, 109 N. Y. Supp. 453. The rule laid down in the text is overruled by the Court of Appeals which holds that to sustain a demurrer on the ground of improper joinder of causes of action, there must be two or more causes of action plainly stated, each in itself complete and perfect on a fair and reasonable construction of the language employed. *Tew v. Wolfsohn*, 174 N. Y. 272, 66 N. E. 934 (followed in *Mack v. Latta*, 83 App. Div. 242, 252, 82 N. Y. Supp. 130).

999 n. 50. *Hallock v. Dillon*, 75 Misc. 292, 132 N. Y. Supp. 796. Cannot be set up as a defense in the answer or

reply. *Schlesinger v. Thalmessinger*, 92 N. Y. Supp. 575.

**1000.** If cause of action pleaded is unintelligible, demurrer lies. *Peters v. Peters*, 137 App. Div. 635, 122 N. Y. Supp. 363. A complaint against an individual as such is demurrable for failure to state a cause of action against him individually. *Romig v. Sheldon*, 124 N. Y. Supp. 26. That complaint is artificially framed is not ground. *Hearn v. Schuchman*, 150 App. Div. 476, 135 N. Y. Supp. 52. Transposition of exhibits attached to the complaint, where not misleading, do not make the complaint demurrable for failure to state a cause of action. *Union Trust Co. v. Van Schaick*, 156 App. Div. 769, 141 N. Y. Supp. 945. A complaint stating a cause of action in contract will be sustained though plaintiff intended to plead in tort. *Dresser v. Mercantile Trust Co.*, 124 App. Div. 891, 108 N. Y. Supp. 577.

**1000 n. 52.** *Kramer v. Barth*, 79 Misc. 80, 139 N. Y. Supp. 341.

**1000 n. 53.** *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721; *Kline Bros. v. German Union Fire Ins. Co.*, 147 App. Div. 790, 132 N. Y. Supp. 181; *Czerney v. Haas*, 144 App. Div. 430, 129 N. Y. Supp. 537; *Theiling v. Marshall*, 140 App. Div. 134, 124 N. Y. Supp. 1066; *Greene v. Mercantile Trust Co.*, 60 Misc. 189, 111 N. Y. Supp. 802; *Pape v. Pratt Institute*, 127 App. Div. 147, 111 N. Y. Supp. 354; *Hall v. Gilman*, 77 App. Div. 458, 461, 79 N. Y. Supp. 302; *Budd v. Howard Thomas Co.*, 40 Misc. 52, 81 N. Y. Supp. 152; *Wallace v. Jones*, 182 N. Y. 37, 74 N. E. 576.

**1000 n. 57.** Cited in *Seamans v. Barentsen*, 180 N. Y. 333, 336, 73 N. E. 42 (but disapproved in so far as the dicta holds that the objection "must" be raised by demurrer).

**1000 n. 59.** *Pearce v. Knapp*, 71 Misc. 324, 127 N. Y. Supp. 1100; *Woolf v. Barnes*, 46 Misc. 169, 93 N. Y. Supp. 219; *Schenectady Contracting Co. v. Schenectady R. Co.*, 106 App. Div. 336, 94 N. Y. Supp. 401. Even where no

answer has been interposed, if a complaint states facts sufficient to constitute a good action at law, it is not demurrable because only equitable relief is prayed for. *Sims v. Farson*, 157 App. Div. 38, 141 N. Y. Supp. 673. Rule not applicable where action brought in an inferior court where jurisdiction depends on relief demanded. *Owen v. Brown*, 78 Misc. 273, 139 N. Y. Supp. 451. Demand for excessive amount is not ground. *Hearn v. Schuchman*, 150 App. Div. 476, 135 N. Y. Supp. 52.

1001 n. 61. *Dingwall v. Chapman*, 63 Misc. 193, 116 N. Y. Supp. 520; *Cozzens v. American General Engineering Co.*, 55 Misc. 393, 106 N. Y. Supp. 548. See *Kienle v. Fred Gretsche Realty Co.*, 133 App. Div. 391, 117 N. Y. Supp. 500. But see *Corscadden v. Haswell*, 88 App. Div. 158, 161, 84 N. Y. Supp. 597; *Pape v. Pratt Institute*, 127 App. Div. 147, 111 N. Y. Supp. 354; *Gray v. Heinze*, 82 Misc. 618, 144 N. Y. Supp. 1045; *Perrin v. Smith*, 135 App. Div. 127, 119 N. Y. Supp. 990. If plaintiff demands equitable relief only, his cause of action must be tested, on demurrer, as one in equity. *Kosovits v. N. Y. First Hungarian St. Stephen's, etc., Soc.*, 130 N. Y. Supp. 72.

1001 nn. 61, 62. Where there are no facts appearing in the complaint which would warrant the relief asked for therein, or any part thereof, though the facts do warrant relief not contemplated by plaintiff, a demurrer will be sustained. *Hasbrouck v. New Paltz, H. & P. Traction Co.*, 98 App. Div. 563, 90 N. Y. Supp. 977.

1001 n. 62. It seems that if the cause of action attempted to be pleaded is an action at law, and the prayer for relief is in equity, the complaint is demurrable. *Consolidated Rubber Tire Co. v. Firestone Tire, etc., Co.*, 135 App. Div. 805, 120 N. Y. Supp. 128.

1001 n. 63. *Gutta Percha & R. Mfg. Co. v. Holman*, 208 N. Y. 583, 101 N. E. 885 [aff. 154 App. Div. 891, 138 N. Y. Supp. 1118]. "Where the facts stated entitle the plaintiff to

some relief, and the relief demanded is in harmony with the allegations, a complaint is not demurrable merely because it contains unnecessary and irrelevant allegations, and demands judgment for more than the facts warrant." *Sisson v. Barnum*, 134 App. Div. 53, 118 N. Y. Supp. 664, 666.

1001 n. 64. *Sims v. Farson*, 157 App. Div. 38, 141 N. Y. Supp. 673.

1001 n. 65. *Kelsey v. Walls*, 55 Misc. 392, 106 N. Y. Supp. 575; *Doyle v. Delaney*, 112 App. Div. 856, 98 N. Y. Supp. 468.

1001 § 893. Failure to allege damages not ground. *Norton v. Kull*, 74 Misc. 476, 132 N. Y. Supp. 387. Not demurrable because erroneous measure of damages stated. *Norton v. Kull*, 74 Misc. 476, 132 N. Y. Supp. 387.

1001 n. 66. *Zebley v. Farmers' Loan & Trust Co.*, 139 N. Y. 461; *Bergmann v. Lord*, 51 Misc. 213, 100 N. Y. Supp. 990.

1001 n. 67. *Mulligan v. Hachmeister*, 117 N. Y. Supp. 1044.

1001 n. 70. *Yarslowitz v. Bienenstock*, 141 App. Div. 64, 125 N. Y. Supp. 649; *Jacocks v. Morrison*, 149 App. Div. 558, 133 N. Y. Supp. 1002; *Dwyer v. Corrugated Paper Products Co.*, 80 Misc. 412, 141 N. Y. Supp. 240; *Fleck v. Friedman*, 49 Misc. 220, 97 N. Y. Supp. 231. Stating facts in the alternative, where any one of the averments would be sufficient on which to found the relief asked for, is not ground of demurrer, but if they are uncertain the remedy is by motion. *Hasberg v. Moses*, 81 App. Div. 199, 205, 80 N. Y. Supp. 867. A complaint in an action against a master to recover damages for death by wrongful act is not demurrable because it alleges that death was caused by defendant's negligence without stating the facts to show negligence, though it might be subject to a motion to make more definite and certain. *Ellsworth v. Franklyn County Agr. Soc.*, 99 App. Div. 119, 91 N. Y. Supp. 1040.

**1001 n. 71.** Misstatement of date of note in copy of complaint served, not misleading defendant. *Hall v. Marvin*, 142 App. Div. 75, 126 N. Y. Supp. 206.

**1001 n. 72.** *Garrison v. Star Co.*, 153 App. Div. 744, 138 N. Y. Supp. 761.

**1002 § 894.** If a defense is improperly incorporated in several separate defenses, plaintiff should move to strike it out before demurring. *Stemmerman v. Kelly*, 122 App. Div. 669, 107 N. Y. Supp. 379.

**1002 n. 77.** *Onderdonk v. Peale, Peacock & Kerr*, 104 App. Div. 195, 93 N. Y. Supp. 505.

**1002 n. 79.** *Haffen v. Tribune Ass'n*, 126 App. Div. 675, 111 N. Y. Supp. 225; *Ugla v. Brokaw*, 77 App. Div. 310, 313, 79 N. Y. Supp. 244. That other matters not defensive are included is no ground for a demurrer. *Gibbs v. Knickerbocker Sav. & L. Co.*, 153 App. Div. 369, 138 N. Y. Supp. 515.

**1002 n. 81.** Defense of statute of limitations may be demurred to. *Devoe v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339.

**1003.** An answer is demurrable where it is neither a denial nor a plea of new matter. *Berg v. Bates*, 153 App. Div. 12, 137 N. Y. Supp. 1022. Defendant has his option to demur or to rely on the Code provision that the defense is deemed controverted. *Continental Securities Co. v. Belmont*, 72 Misc. 94, 129 N. Y. Supp. 777. Not ground of demurrer that some of the matter contained in the answer is not defensive. *Gibbs v. Knickerbocker Sav. & L. Co.*, 153 App. Div. 369, 138 N. Y. Supp. 515. Not ground that defense does not show whether it is pleaded as an entire or partial defense. *Bergstrom v. Commercial Advertisers' Assoc.*, 147 App. Div. 774, 131 N. Y. Supp. 1025, 3 Civ. Pro. (N. S.) 91. If facts are good as a partial defense, demurrer on ground that they state neither a complete or partial defense will be overruled. *Bergstrom v. Commercial Advertisers'*

Assoc., 147 App. Div. 774, 131 N. Y. Supp. 1025, 3 Civ. Pro. (N. S.) 91. An answer alleging that plaintiff has not capacity to sue is not demurrable as "insufficient in law." *Prankard v. Cooley*, 147 App. Div. 145, 132 N. Y. Supp. 289. Matter set up as defense is demurrable where it constitutes no bar to the action though it might be available as a counterclaim. *Farmers' Nat. Bank v. St. Regis Paper Co.*, 77 App. Div. 558, 78 N. Y. Supp. 889. A demurrer to the defense of statute of limitations lies where the insufficiency of the plea is clearly apparent. *Holland v. Grote*, 107 N. Y. Supp. 667; *Gray Lith. Co. v. American Watchman's Time Detector Co.*, 44 Misc. 206, 88 N. Y. Supp. 857. Where a defendant, brought in by supplemental summons, sets up in his answer objections to the sufficiency of the amended complaint under section 498 of the Code, it may be demurred to as a defense. *Nellis v. Rowles*, 41 Misc. 313, 84 N. Y. Supp. 753. Where a partial defense is demurred to, the only question is whether such defense is sufficient to extenuate or modify the severity of the judgment which might otherwise be rendered against defendant. *Whalen v. Union Bag & Paper Co.*, 130 App. Div. 313, 114 N. Y. Supp. 220.

1003 n. 84. See *Harris & Schwartz v. Combs*, 134 App. Div. 975, 119 N. Y. Supp. 297. If the facts alleged in an answer have relation to the subject-matter, and are calculated to affect the action of the court in determining whether an injunction should be granted, or its extent if one is granted, the effect that will be given to them cannot be determined on demurrer. *Straus v. American Publishers' Ass'n*, 103 App. Div. 277, 92 N. Y. Supp. 1052. When a defense consists of facts which the defendant will prove upon the trial to affect the extent of discretionary relief that a court of equity will grant, it is not insufficient, upon the face thereof, even though it would appear upon an inspection of the pleadings that the facts alleged would not in themselves be

sufficient to justify the court in refusing the plaintiff any relief. *Id.*

1003 n. 85. *Ward v. Chelsea Exch. Bank*, 153 App. Div. 638, 138 N. Y. Supp. 720; *Pollitz v. Wabash R. R. Co.*, No. 1, 150 App. Div. 709, 135 N. Y. Supp. 785; *O'Hara v. Murphy*, 144 App. Div. 113, 128 N. Y. Supp. 1009; *Butler v. General Acc. Assur. Corp.*, 103 App. Div. 273, 92 N. Y. Supp. 1025.

1003 n. 90. *Uggla v. Brokaw*, 77 App. Div. 310, 315, 79 N. Y. Supp. 244. *Kraus v. Agnew* is officially reported in 80 App. Div. 1. The contrary, i. e., that a so-called "defense" which sets up no new matter other than that put in issue by a denial is demurrable because it is "insufficient in law on the face thereof" is held in *George v. City of N. Y.*, 42 Misc. 270, 86 N. Y. Supp. 610; *Blumenfeld v. Stine*, 42 Misc. 411, 87 N. Y. Supp. 81; *Jaeger v. City of N. Y.*, 39 Misc. 543, 80 N. Y. Supp. 356.

1003 n. 92. *Holland v. Grote*, 56 Misc. 370, 107 N. Y. Supp. 667. The *Olivella* case was affirmed in 51 App. Div. 612, 64 N. Y. Supp. 1145, on the authority of *Golden v. Health Dept.*, 21 App. Div. 420, 47 N. Y. Supp. 623, and was followed in *Edmonds v. Stern*, 89 App. Div. 539, 85 N. Y. Supp. 665, which fix the rule, at least in the first department, that where the complaint is purely equitable in its nature and only equitable relief can be afforded, a defense that there is an adequate remedy at law is demurrable.

1003 n. 93. So held in *Corn v. Levy*, 97 App. Div. 48, 89 N. Y. Supp. 658 (which reviews the conflicting decisions). *Contra*, *Stroock Plush Co. v. Talcott*, 129 App. Div. 14, 113 N. Y. Supp. 214.

1003 n. 94. *Uggla v. Brokaw*, 77 App. Div. 310, 313, 79 N. Y. Supp. 244; *Holmes v. Northern Pac. R. Co.*, 65 App. Div. 49, 72 N. Y. Supp. 476; *Blaut v. Blaut*, 41 Misc. 572, 85 N. Y. Supp. 146.



**1004 n. 95.** The plaintiff is not deprived of his right to demur by the incorporation of such denials, but before he can exercise such right with safety he should move to strike out those denials. *Barber v. Davidson*, 62 Misc. 552, 115 N. Y. Supp. 819.

**1004 n. 97.** See *Bates v. Delaware, L. & W. R. Co.*, 109 App. Div. 774, 96 N. Y. Supp. 711, holding that a demurrer was not to a part of a defense. But where, in an action for slander, matters in justification are set forth as a complete defense and matters in mitigation as a partial defense, plaintiff may demur solely to that part of the answer setting up justification. *Jansen v. Fischer*, 45 Misc. 361, 90 N. Y. Supp. 346. A motion to strike immaterial matter as redundant should be first made. *Wiener v. Boehm*, 126 App. Div. 703, 111 N. Y. Supp. 126; *Strauss v. St. Louis County Bank*, 126 App. Div. 647, 111 N. Y. Supp. 130.

**1004 n. 99.** See *Fehlinger v. Boos*, 118 N. Y. Supp. 167. Where affirmative relief is demanded in the counterclaim, it is not open to a demurrer on the ground that it is insufficient in law upon the face thereof. *Isabell-Porter Co. v. Heineman*, 113 App. Div. 79, 98 N. Y. Supp. 1018; *Sand v. Kenney Mfg. Co.*, 113 N. Y. Supp. 972; *Hudson River Water Power Co. v. Glens Falls Gas & E. L. Co.*, 90 App. Div. 513, 85 N. Y. Supp. 577.

**1004 § 895.** Cannot demur to a paragraph of a reply. *Sullivan v. Murphy*, 120 N. Y. Supp. 55. Propriety of pleading a defense in a reply is not raised by a demurrer to the reply. *Brownrigg v. Brownrigg*, 80 Misc. 108, 140 N. Y. Supp. 778 [aff. in 156 App. Div. 913, 141 N. Y. Supp. 1111].

**1005 n. 103.** See *Wertheim v. Maintenance Co.*, 135 App. Div. 760, 119 N. Y. Supp. 909. Where reply alleges facts already in the pleadings it is demurrable. *Klauder v. C. V. G. Import Co.*, 61 Misc. 255, 113 N. Y. Supp. 716.

**1005 n. 104.** *Young v. Dresser*, 137 App. Div. 313, 122 N. Y. Supp. 29.

**1005 n. 107.** A defendant not mentioned except in the caption of the complaint may demur. *Walbridge v. Bklyn. Trust Co.*, 143 App. Div. 502, 128 N. Y. Supp. 686.

**1005 n. 108.** *Schilling Co. v. Robert H. Reid & Co.*, 42 Misc. 94, 85 N. Y. Supp. 1010.

**1005 n. 109.** *Duck v. McGrath*, 160 App. Div. 482, 145 N. Y. Supp. 1033; *Warner v. James*, 88 App. Div. 567, 85 N. Y. Supp. 153; *Mawhinney v. Bliss*, 124 App. Div. 609, 109 N. Y. Supp. 332; *Holmes v. Seaboard Portland Cement Co.*, 63 Misc. 82, 116 N. Y. Supp. 524.

**1005 § 897.** Demurrer must be in writing. *Crowley v. La Brake*, 147 App. Div. 389, 132 N. Y. Supp. 155. The objection that special damages are not sufficiently pleaded may be taken by demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Reporters' Association v. Sun Printing & Publishing Co.*, 186 N. Y. 437, 79 N. E. 710; *Fagan v. New York Evening Journal Pub. Co.*, 129 App. Div. 28, 113 N. Y. Supp. 62. On demurrer for defect of parties, all defects of parties must be pointed out. When a demurrer to a complaint upon the ground of a defect in parties has been sustained, and the plaintiff has been allowed to serve a supplemental summons and amended complaint on terms, the amended complaint should not thereafter be dismissed on the ground that a party was not sued individually as well as executor, which defect of parties appeared upon the face of the first complaint, but was not pointed out on the first demurrer, as required by section 488 of the Code. *Smith v. Irvin*, 113 App. Div. 55, 98 N. Y. Supp. 945.

**1006.** Misjoinder of plaintiffs must be distinctly specified, and if not the objection is waived. *Trustees of Sailors' Snug Harbor v. Carmody*, 77 Misc. 494, 137 N. Y. Supp. 968.

**1006** n. 115. *Palmer v. Roods*, 116 App. Div. 66, 101 N. Y. Supp. 186. *Contra*, *Irving v. Rees*, 146 App. Div. 703, 131 N. Y. Supp. 523 [foll. in *Prankard v. Cooley*, 147 App. Div. 145, 132 N. Y. Supp. 289].

**1006** n. 117. *Newcombe v. Ostrander*, 66 Misc. 103, 122 N. Y. Supp. 823.

**1007** n. 121. Demurrer for defect of parties must specify the parties who ought to be joined. *Feinstein v. Jacobson*, 161 App. Div. 121, 146 N. Y. Supp. 525.

**1008** n. 131. *Kneeland v. Pennell*, 49 Misc. 94, 96 N. Y. Supp. 403.

**1010** § 898. See also ante, **880** § 815. Stipulation as controlling decision on demurrer, see *Fish v. Delaware, L. & W. R. Co.*, 158 App. Div. 92, 143 N. Y. Supp. 365. "A demurrer may be brought on for trial as an issue of law. Code Civ. Pro., §§ 963, 965, 969. In which case a notice of trial must be served. On the determination of the issue, if the demurrer be sustained or overruled, and leave given to amend or to withdraw the demurrer and plead over, and the privilege is availed of, costs after notice of trial and the trial fee of an issue of law are properly imposed. But if final judgment is directed, or if final judgment is entered because the privilege of amending or pleading over is not accepted, then costs before and after notice of trial and the trial fee of an issue of law are taxable. *De Truckheim v. Thomas*, 113 App. Div. 123. Or an issue of law may be brought on and tried at any term of court as a contested motion. Code Civ. Pro., § 976. In which case a notice of motion and not a notice of trial is served, and on the determination of the motion if the demurrer is sustained and leave given to amend or overruled and leave given to withdraw the demurrer and plead over, only ten dollars motion costs are allowed. If final judgment is entered, costs before notice of trial and the motion costs are taxable. Or a motion may be made for judgment on the pleadings (Code

Civ. Pro., § 547) which, of course, must be brought on by notice of motion, and the court on determining the motion, if leave to amend or to withdraw the demurrer and plead over be given, has power to impose such terms as may be just." *Kramer v. Barth*, 79 Misc. 80, 81, 139 N. Y. Supp. 341. "Further amendments to the Code of Civil Procedure eliminating the provisions for the trial of an issue of law otherwise than by motion, and the requirements for a written decision and interlocutory judgment, would simplify the practice and carry into effect the legislative intent by making that which now rests in the discretion of litigants, whether to bring on the demurrer by notice of trial or notice of motion, mandatory by providing only the simpler and more rational method of motion, but so long as both procedures are recognized the court must adapt its procedure in compliance with the statutory requirements." *Kramer v. Barth*, 79 Misc. 80, 83, 139 N. Y. Supp. 241. See further as to bringing on hearing by motion for judgment on the pleadings, post, 1084 § 926.

1010 n. 140. *Yarslowitz v. Bienenstock*, 141 App. Div. 64, 125 N. Y. Supp. 649. Only the allegations of the pleading can be considered. *Hirsch v. New England Navigation Co.*, 200 N. Y. 263, 93 N. E. 524.

1011. Failure to separately state causes of action does not preclude their separate consideration on demurrer. *Hevia v. Wheelock*, 155 App. Div. 387, 140 N. Y. Supp. 351. The sufficiency of a pleading to which a demurrer is interposed should not be determined on a concession which forms no part of the record, and is not incorporated in the pleading by an appropriate amendment. *Keene v. Newark Watch Case Material Co.*, 81 App. Div. 48, 80 N. Y. Supp. 859. On demurrer to a counterclaim, defendant cannot urge its sufficiency as a defense. *Rogers v. Morton*, 46 Misc. 494, 95 N. Y. Supp. 49.

1011 n. 149. *Mott v. De Nisco*, 106 App. Div. 154, 94

N. Y. Supp. 380; *Blumenfeld v. Stine*, 42 Misc. 411, 87 N. Y. Supp. 81.

**1011 n. 152.** Material allegations in complaint, not denied, will be taken as true. *Salomon v. Gleichenhaus*, 131 N. Y. Supp. 599.

**1012 n. 157.** *Rebadow v. Buffalo Savings Bank*, 63 Misc. 407, 117 N. Y. Supp. 282; *Climax Specialty Co. v. Seneca Button Co.*, 54 Misc. 152, 38 Civ. Proc. R. 476, 103 N. Y. Supp. 822.

**1012 n. 158.** So if one branch of counterclaim is good. *Fliess v. Hoy*, 150 App. Div. 555, 135 N. Y. Supp. 44. So where matter alleged as a defense and a counterclaim is good as a defense but not as a counterclaim. *Gitler v. Russian Co.*, 55 Misc. 553, 106 N. Y. Supp. 886. A demurrer to the whole answer should be overruled if there is an issue raised by any of the denials or allegations. *George A. Fuller Co. v. Manhattan Const. Co.*, 44 Misc. 219, 88 N. Y. Supp. 1049.

**1012 n. 159.** On demurrer to answer all the facts in both answer and complaint are to be taken as true. *National Gum & Mica Co. v. MacCormack*, 124 App. Div. 569, 109 N. Y. Supp. 286. A demurrer, for insufficiency, to new matter in the answer, requires that it, as well as the matter alleged in the complaint to which the answer refers, be taken as admitted. *Schlesinger v. Burland*, 42 Misc. 206, 208, 85 N. Y. Supp. 350. But allegations as to the law of a foreign state are not admitted by a demurrer. *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 77 N. E. 877.

**1012 n. 162.** *Hamilton Trust Co. v. Shevlin*, 156 App. Div. 307, 141 N. Y. Supp. 232. On a demurrer, no inference or assumption can be indulged in except such as properly arises from the pleading to which the demurrer is served. *Hirsch v. New England Navigation Co.*, 200 N. Y. 263, 93 N. E. 524 [rev. 129 App. Div. 178].

**1012 n. 163.** *Wise v. Tube Bending Machine Co.*, 194 N. Y. 272, 87 N. E. 430 [affirming mem. decision in 119

App. Div. 920, 105 N. Y. Supp. 1150]; *White v. City of Buffalo*, 131 App. Div. 531, 115 N. Y. Supp. 1021; *Ellis v. Keeler*, 126 App. Div. 343, 110 N. Y. Supp. 542; *Delaware County Nat. Bank v. King*, 109 App. Div. 553, 95 N. Y. Supp. 956; *Newton v. Jay*, 107 App. Div. 457, 95 N. Y. Supp. 413; *Petty v. Emery*, 96 App. Div. 35, 88 N. Y. Supp. 823; *Burrowes Co. v. Rapid Safety Filter Co.*, 49 Misc. 539, 97 N. Y. Supp. 1048; *McCarthy v. Fitzgerald*, 139 N. Y. Supp. 950. As to law of another state. *Fish v. Delaware, L. & W. R. Co.*, 158 App. Div. 92, 143 N. Y. Supp. 365 [aff. 79 Misc. 636, 141 N. Y. Supp. 245].

1012 n. 164. *Rosenthal v. Rubin*, 148 App. Div. 44, 132 N. Y. Supp. 1053.

1013. Plaintiff should be permitted to withdraw his demurrer on proper terms, where defendant will not be prejudiced. *Continental Securities Co. v. Belmont*, 72 Misc. 94, 129 N. Y. Supp. 777.

1013 n. 171. *Hamilton Trust Co. v. Shevlin*, 156 App. Div. 307, 141 N. Y. Supp. 232; *Gminder v. Zeltner Brewing Co.*, 126 App. Div. 776, 111 N. Y. Supp. 215.

1013 n. 173. Withdrawal of demurrer to complaint for failure to state cause of action, where leave to answer is given, does not preclude setting up any facts which defendant might originally have set up. *McCargo v. Jergens*, 206 N. Y. 363, 99 N. E. 838 [rev. 149 App. Div. 537, 133 N. Y. Supp. 956].

1013 n. 176. Decision on demurrer is not *res judicata* so as to preclude attacking the pleading demurrer to, on appeal, for failure to state a cause of action, where the demurrant pleaded over after demurrer overruled. *Fulton County Gas & Electric Co. v. Hudson River Telephone Co.*, 130 App. Div. 343, 114 N. Y. Supp. 642.

1013 n. 177. *Pease Oil Co. v. Monroe Co. Oil Co.*, 78 Misc. 285, 138 N. Y. Supp. 177; *Bigelow v. Drummond*, 42 Misc. 617, 620, 87 N. Y. Supp. 581.

**1014 n. 178.** *Contra*, *Fulton County Gas, etc., Co. v. Hudson River Tel. Co.*, 200 N. Y. 287, 93 N. E. 1052 [aff. 130 App. Div. 343]; *Aetna Life Ins. Co. v. North Star Mines Co.*, 56 Misc. 164, 107 N. Y. Supp. 140. But demurrer to counterclaim on the grounds of its insufficiency does not raise the question of the sufficiency of the complaint. *Fulton Co. Gas, etc., Co. v. Hudson River Tel. Co.*, 200 N. Y. 287, 93 N. E. 1052, 2 Civ. Pro. (N. S.) 252 [aff. 130 App. Div. 343].

**1014 n. 180.** *Vulcan Iron Works v. Pittsburgh Eastern Co.*, 144 App. Div. 827, 129 N. Y. Supp. 676; *Hawes v. Dunlop*, No. 2, 136 App. Div. 631, 121 N. Y. Supp. 382; *Davenport v. Walker*, 132 App. Div. 96, 116 N. Y. Supp. 411; *Maher v. Potter*, 112 N. Y. Supp. 102; *Parker Co. v. New York*, 110 App. Div. 360, 97 N. Y. Supp. 200; *George v. New York*, 42 Misc. 270, 274, 86 N. Y. Supp. 610; *Bigelow v. Drummond*, 42 Misc. 617, 87 N. Y. Supp. 581. In determining whether the complaint states a cause of action, the answer will not be taken as true. *Nichols v. Riley*, 118 App. Div. 404, 103 N. Y. Supp. 554.

**1014 n. 181.** *New York Central Iron Works Co. v. Brennan*, 116 N. Y. Supp. 457.

**1014 § 899.** Under the 1909 amendment of § 976 of the Code providing that an issue of law may be brought on and tried at any term of court, as a contested motion, a decision on a demurrer brought on as a contested motion may be embodied in an order. *National Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846. If hearing brought on as a contested motion, under Code, § 976, a decision and interlocutory judgment are not necessary. *People v. Bleecker St., etc., R. R. Co.*, 67 Misc. 582, 124 N. Y. Supp. 786; *Loos v. Leahy*, 144 App. Div. 558, 129 N. Y. Supp. 859. Where, after demurrer to answer is overruled, plaintiff does not withdraw his demurrer but proceeds to trial, the complaint will be dismissed. *Mills Power Co. v. Mohawk Hydro-Electric Co.*, 143 App. Div. 890, 128 N. Y. Supp. 810.

**1014 n. 184.** *Nachod v. Hindley*, 118 App. Div. 658, 103 N. Y. Supp. 801; *Vincent v. Stearns*, 47 Misc. 95, 93 N. Y. Supp. 482.

**1015.** Interlocutory judgment need not be entered, where defendant fails to answer over after a demurrer to the complaint is overruled, but an appeal may be taken from the order. *Shiffner v. Beck*, 159 App. Div. 821, 145 N. Y. Supp. 27.

**1015 n. 190.** Only one decision can be filed and only one judgment entered. *Pritz v. Jones*, 117 App. Div. 643, 102 N. Y. Supp. 549. On entering final judgment, proof must be made before the clerk that notice was given of the entry of the interlocutory judgment as required therein. *Tudor v. Ebner*, 109 App. Div. 521, 96 N. Y. Supp. 392.

**1016.** On sustaining demurrer with leave to plead over, the order should not limit or point out the allegations to be included in the amended pleading. *John Reis Co. v. Zimmerli*, 155 App. Div. 260, 140 N. Y. Supp. 3.

**1016 n. 199.** *Myers v. Lederer*, 117 App. Div. 27, 101 N. Y. Supp. 1088. Where the overruling of a demurrer with leave to plead over is affirmed by the Appellate Division without granting such leave, an application for leave to plead over can be made only to the Appellate Division. *White v. Jackson*, 39 Misc. 218, 79 N. Y. Supp. 393. That motion should be made in lower court, where appellate court sustains a demurrer, see *Schnabel v. Hanover Nat'l Bk.*, 78 Misc. 35, 137 N. Y. Supp. 727. On allowing a demurrer to the complaint, leave may be granted to amend so as to state a cause of action for different relief. *McNulty v. Gilbert*, 154 App. Div. 297, 138 N. Y. Supp. 996. Construction of order, see *Mann v. Press Pub. Co.*, 135 App. Div. 361, 120 N. Y. Supp. 534.

**1016 n. 202.** *Peters v. Needham Piano & Organ Co.*, 124 App. Div. 749, 109 N. Y. Supp. 572; *National Contracting Co. v. Hudson River W. P. Co.*, 110 App. Div.



133, 97 N. Y. Supp. 92. But see *Nachod v. Hindley*, 118 App. Div. 658, 103 N. Y. Supp. 801. Where no leave is granted, judgment on the pleadings is proper. *Thistle v. Jones*, 123 App. Div. 40, 107 N. Y. Supp. 840.

**1016 n. 204.** Proper exercise of discretion to refuse after two prior unsuccessful amendments. *Hamilton Trust Co. v. Shevlin*, 156 App. Div. 307, 141 N. Y. Supp. 232.

**1017.** On overruling demurrer to complaint, with leave to answer over, the Appellate Division imposed, as a condition of answering, payment of costs in that court and in the court below. *Trotter v. Lisman*, 154 App. Div. 922, 139 N. Y. Supp. 1148 [aff. in 209 N. Y. 174, 102 N. E. 575]. Where interlocutory judgment overruling demurrer gave leave to enter final judgment if costs not paid within twenty days, it should be modified by allowing a withdrawal of the demurrer. *Peters v. Needham Piano & Organ Co.*, 124 App. Div. 749, 109 N. Y. Supp. 572.

**1017 n. 210.** See also *Fulton County Gas & Electric Co. v. Hudson River Telephone Co.*, 130 App. Div. 343, 114 N. Y. Supp. 642.

**1018 n. 215.** But see *Crotty v. Erie R. R. Co.*, 149 App. Div. 262, 133 N. Y. Supp. 696.

**1018 n. 217.** *Crotty v. Erie R. R. Co.*, 149 App. Div. 262, 133 N. Y. Supp. 696.

**1019.** In the second line in the last form, change the words "found by plaintiff" to "formed by plaintiff's complaint."

**1019 n. 220.** The judgment should follow the order or decision. It should not direct that, in case of failure to plead over, judgment be entered for the sum demanded in the complaint. It should provide that, in case of failure to plead over, final judgment may be entered in accordance with the provisions of the Code of Civil Procedure applicable in such cases. *Smythe v. Greacen*, 96 App. Div. 182, 89 N. Y. Supp. 111.

## CHAPTER VI

## AMENDMENTS

**1020 § 900.** A motion to amend the prayer for relief in a complaint is a motion to amend the complaint. *McVey v. Security Mut. Life Ins. Co.*, 118 App. Div. 466, 103 N. Y. Supp. 1056.

**1022.** Amended answer may be served after demurrer thereto has been filed in which case the amended answer will be the one considered on the hearing. *Ullman v. Tanner*, 127 App. Div. 808, 111 N. Y. Supp. 844. Answer may be amended after default set aside for failure to answer. *O'Reilly v. Skelly*, 56 Misc. 122, 106 N. Y. Supp. 1082.

**1022 n. 13.** See also *Town of Hancock v. Delaware & E. R. Co.*, 128 App. Div. 693, 113 N. Y. Supp. 80 (where agreement to permit amendment on payment of costs considered as equivalent to amendment as of course). But where an amended complaint is served after an amended answer has been served as of course, another amended answer may be served as of course. *Brooks Bros. v. Tiffany*, 117 App. Div. 470, 102 N. Y. Supp. 626.

**1022 n. 14.** *Backes v. Mechanics' & Traders' Bank*, 130 App. Div. 20, 114 N. Y. Supp. 459. But where one amendment is made in consequence of objections raised by a motion, but where no order has been made compelling the amendment, the right to amend as of course is exhausted. *Freyhan v. Wertheimer*, 52 Misc. 636, 102 N. Y. Supp. 839.

**1023 n. 26.** *Congregational Kehal Adath Jeshuran M'Yassy v. Universal Bldg., etc., Co.*, 118 N. Y. Supp. 478. "Defendant claims that by the service of notice of trial, plaintiff waives its rights to serve an amended complaint as of course, and relies upon *Philips v. Suydam*, 54 Barb. 153. That case was overruled upon the dissenting opinion of Justice Clarke in *Clifton v. Brown*, 27 Hun, 231." Congre-

gation Kehal Adath Jeshurun M'Yassy v. Universal Bldg., etc., Co., 118 N. Y. Supp. 478.

**1024.** A defense arising after service of the original answer cannot be set up other than by a supplemental answer by leave of court. *Galm v. Sullivan*, 117 App. Div. 235, 101 N. Y. Supp. 1060.

**1024** nn. 28, 29. The rule laid down in the text and the later conflicting decisions in *Schlegel v. Roman Catholic Church of the Most Holy Trinity*, 194 N. Y. 391, 87 N. E. 426 [affirming mem. decision in 127 App. Div. 929, 111 N. Y. Supp. 1143]; *Bucklin v. Buffalo, A. & A. R. Co.*, 41 Misc. 557, 85 N. Y. Supp. 114; *Schlesinger v. Borough Bank*, 112 App. Div. 121, 98 N. Y. Supp. 136; *Bates v. Plasmon Co.*, 41 Misc. 16, 83 N. Y. Supp. 573, was subject to the amendment to section 798 of the Code by Laws 1909, c. 423, which expressly provided that "the time of a party to amend his own pleading shall not be extended by the service thereof by mail," but this amended provision was stricken out by Laws 1910, c. 577. For 1910 amendment, see ante, **663** n. 70.

**1024** n. 32. *Gottwald v. Weil*, 68 Misc. 468, 124 N. Y. Supp. 333.

**1025** n. 41. *Crotty v. Erie R. Co.*, 149 App. Div. 262, 133 N. Y. Supp. 696.

**1025** n. 42. Notice of the application to strike is necessary. *Murphy v. Lyon*, 127 App. Div. 448, 112 N. Y. Supp. 152. To show that the amended pleading was served for purpose of delay, threats to use dilatory tactics if a proposition for settlement of the cause of action was not accepted are properly considered. *Naylor v. Loomis*, 79 App. Div. 21, 79 N. Y. Supp. 1011.

**1025** n. 43. Where plaintiff served a notice of trial before answer, pursuant to an order of court granting an extension of the time to answer on condition that the issue be as of the date the answer was originally due, and thereafter de-

fendant served an amended answer as of course, it was improper to strike out the amended answer unless defendant consented that the date of issue remain as if no amended answer had been served. *Muglia v. Erie R. Co.*, 97 App. Div. 532, 90 N. Y. Supp. 216.

1026 n. 45. See *Beyer v. Henry Huber Co.*, 115 App. Div. 342, 100 N. Y. Supp. 1029.

1026 § 902. It is proper to permit an answer, in an action by the people to recover damages for cutting timber on state lands, to be amended to set up an estoppel and the unconstitutionality of the statute, authorizing treble damages. *People v. Ostrander*, 144 App. Div. 860, 129 N. Y. Supp. 922. Granting of amendment to complaint so as to change form of action from an individual action to a taxpayer's action held improper because deemed not "in furtherance of justice." *Guenther v. Patch*, 155 App. Div. 27, 140 N. Y. Supp. 223 [rev. 76 Misc. 649, 135 N. Y. Supp. 629]. After service of an answer, plaintiff may be allowed to amend by setting up a second cause of action on an account stated for the same sum claimed in the first cause of action. *Salvage v. Hartley Silk Mfg. Co.*, 153 App. Div. 736, 138 N. Y. Supp. 800. A complaint in a negligence case commenced under section 1902 of the Code may be amended so as to set out the fact that the notice required by the Employers' Liability Act was served on the defendant, although the motion for such leave to amend is not made until after the expiration of one year from the date of the accident. *Miller v. Erie R. Co.*, 109 App. Div. 612, 96 N. Y. Supp. 244. The cause of action may be changed from one to recover on a contract to one to recover for a breach thereof. *Dunham v. Hastings Pavement Co.*, 109 App. Div. 514, 96 N. Y. Supp. 313. A defense may be amended by setting up substantially the same facts as a counterclaim. *Sackett v. Milholland*, 49 Misc. 439, 99 N. Y. Supp. 948.

**1026 n. 49.** *Muller v. Philadelphia*, 113 App. Div. 92, 99 N. Y. Supp. 93.

**1026 n. 50.** *Washington Life Ins. Co. v. Scott*, 119 App. Div. 847, 104 N. Y. Supp. 898. See *Murtagh v. Kingsland Brick Co.*, 119 App. Div. 286, 104 N. Y. Supp. 515. That the granting of the order is discretionary, see *Westinghouse, Church, Kerr & Co. v. Remington Salt Co.*, 89 App. Div. 126, 85 N. Y. Supp. 432.

**1026 n. 51.** *Manhattan Rolling Mill v. Dellon*, 63 Misc. 48, 116 N. Y. Supp. 583; *Reynolds v. Wynne*, 127 App. Div. 69, 111 N. Y. Supp. 248; *Rubin v. Marine Steamship Co.*, 51 Misc. 665, 101 N. Y. Supp. 30. See *Shirley v. Bernheim*, 123 App. Div. 428, 107 N. Y. Supp. 946.

**1027.** Amendment to allow recovery on a quantum meruit will not be allowed where such a recovery is inconsistent with the contract alleged. *Donovan v. Harriman*, 139 App. Div. 586, 124 N. Y. Supp. 194. In action to construe will, Special Term should not allow amendment to answer so as to call on plaintiff (executrix) to account. *Reed v. Clark*, 144 App. Div. 178, 128 N. Y. Supp. 1006. Complaint in suit to foreclose a mechanic's lien should be allowed to be amended so as to include the necessary allegation that no other action has been had. *Kalt Lumber Co. v. Dupignac*, 150 App. Div. 400, 134 N. Y. Supp. 1098. Where no cause of action is shown against executors as individuals, on the motion, amendment will not be allowed making them parties individually as well as in a representative capacity. *Helling v. Boss*, 121 N. Y. Supp. 1013. An unnecessary amendment will not be allowed. *Le Brantz v. Campbell*, 89 App. Div. 583, 85 N. Y. Supp. 654. So held where act sought to be enjoined was discontinued before trial and plaintiff sought to amend by striking out demand for injunctive relief. *Whaley v. City of N. Y.*, 83 App. Div. 6, 81 N. Y. Supp. 1043. So leave will not be given to serve an amended answer setting up as special defense facts provable under

the general denial already pleaded. *Schultz v. Greenwood Cemetery*, 46 Misc. 299, 93 N. Y. Supp. 180. A defense referring to another defense for certain of its facts may set forth such facts in full in an amended answer even after they have, on motion, been stricken out of the defense referred to. *Edison v. Press Pub. Co.*, 85 App. Div. 376, 83 N. Y. Supp. 174.

1027 n. 52. *Contra*, *Dobbs v. Pearl*, 118 N. Y. Supp. 485 [foll. *Logeling v. New York El. R. Co.*, 5 App. Div. 198, 38 N. Y. Supp. 1112].

1027 n. 58. See *People v. Munn*, 131 App. Div. 341, 115 N. Y. Supp. 803 [where laches held not fatal].

1027 n. 63. The amendment will be denied where not in furtherance of justice. *Muller v. Philadelphia*, 49 Misc. 322, 99 N. Y. Supp. 194.

1028 nn. 72, 73. A motion before a referee made on the first day for the hearing and decided at the next hearing cannot be said to be made before the trial. *Barnum v. Williams*, 91 App. Div. 464, 467, 86 N. Y. Supp. 821.

1028 § 903. It is not an abuse of discretion to deny defendant's motion to withdraw a juror, and for leave to apply to Special Term to amend the answer for the purpose of setting up matters which do not constitute a defense. *Smith v. Dixon*, 150 App. Div. 571, 134 N. Y. Supp. 1097. "It is not competent to at the trial so amend a complaint that it shall for the first time set forth a cause of action. An amendment contemplates that there shall be something to amend. Such an application must be made at the Special Term." *Hollander v. Lustik*, 79 Misc. 103, 109, 140 N. Y. Supp. 659. In action to foreclose mechanic's lien, complaint may be amended on the trial by adding an allegation that no other action has been brought on the debt. *Douglass v. Carlin Construction Co.*, 149 App. Div. 856, 134 N. Y. Supp. 709.

1029. Allowing amendment at the opening of the trial, so  
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as to make the first cause of action the same as the second, does not prejudice defendant. *Reusens v. Arkenburgh*, 135 App. Div. 75, 119 N. Y. Supp. 821. May permit amendment to more fully set forth the specific acts constituting the negligence relied on. *Powell v. Cohoes Ry. Co.*, 136 App. Div. 204, 120 N. Y. Supp. 336. Leave to amend is properly denied, where the amendment would have imported into the trial, and near its close, an issue which was not suggested in the pleadings, and one which the defendant, according to his attorney, was not prepared to try, especially where the fact that the issue sought to be introduced by amendment was not presented by the pleadings, was called to the attention of the plaintiff's attorney by the trial justice, who at the same time suggested to him that he withdraw a juror, and apply at Special Term for leave to amend the complaint in the respects desired, and in such a way that the action could be tried in equity, where full justice could be done between the parties, and the attorney refused so to do. *Kuntz v. Schnugg*, 99 App. Div. 191, 90 N. Y. Supp. 933.

1029 n. 76. *Candee & Smith v. Fordham Stone Renovating Co.*, 126 App. Div. 15, 110 N. Y. Supp. 355; *Rosseau v. Rouss*, 91 App. Div. 230, 233, 86 N. Y. Supp. 497. Negligence and nuisance are different causes of action. *Moniot v. Jackson*, 40 Misc. 197, 81 N. Y. Supp. 688. New defense cannot be set up by amendment on the trial. *Robinson v. Lampel*, 97 App. Div. 198, 89 N. Y. Supp. 853. Must be something to amend by, and hence cannot amend on the trial so as to for the first time state a cause of action. *Hollander v. Lustik*, 79 Misc. 103, 140 N. Y. Supp. 659. Defense cannot be substantially changed. *Cruver Mfg. Co. v. Spooner*, 147 App. Div. 471, 131 N. Y. Supp. 866. An amendment is improper which substantially changes the cause of action pleaded. *Hamilton v. Mendham*, 129 N. Y. Supp. 53.

1029 n. 79. "The learned trial court having determined

that the complaint did not state facts sufficient to constitute a cause of action ought not to have allowed the service of an amended complaint, unless the defect was one merely of form which could properly have been cured on the trial without changing the issues or prejudicing the defendant. In a more serious case the trial court should have given leave to the plaintiff to apply at the Special Term for an order permitting the service of an amended complaint, where proper terms could have been imposed, upon granting the favor asked." *Steffe v. Heinzer*, 156 App. Div. 575, 576, 141 N. Y. Supp. 584. Amendment of answer held improperly denied. *F. Steiger Trunk & Bag Co. v. Wharncliffe*, 62 Misc. 14, 114 N. Y. Supp. 462.

**1030.** Party may be added as plaintiff. *Plister v. Heins*, 136 App. Div. 457, 121 N. Y. Supp. 173. Where administrator sues as such to recover the value of services rendered by his deceased daughter, and it appears on the trial she was a minor when the services were rendered, an amendment of the complaint in effect permitting him to sue also in his individual capacity is improper. *Doyle v. Carney*, 190 N. Y. 386, 83 N. E. 37. The complaint may be amended so as to show that the action is "for the use of" a third person. *Dilcher v. Nellany*, 52 Misc. 364, 102 N. Y. Supp. 264.

**1030 n. 80.** Amendment to plead defense that plaintiff was not the real party in interest refused as not in furtherance of justice. *Calvert v. Thurston*, 58 Misc. 347, 109 N. Y. Supp. 567.

**1030 n. 81.** Amendment changing action by administrator to one by him individually and as guardian ad litem for his children held to state a new cause of action. *Johnson v. Phoenix Bridge Co.*, 133 App. Div. 807, 118 N. Y. Supp. 88. And see *Bowen v. Phoenix Bridge Co.*, 118 N. Y. Supp. 93.

**1030 n. 82.** But see **796 n. 26.**



**1030 n. 83.** This case is criticised in *Schun v. Brooklyn Heights R. Co.*, 82 App. Div. 560, 81 N. Y. Supp. 859, and the court refuses to follow it in so far as it holds that a plaintiff cannot, by amendment after issue joined, add a third joint tortfeasor as a party defendant. See also *Hinds, Noble & Eldridge v. Bonner*, 52 Misc. 461, 102 N. Y. Supp. 484. Compare **422 n. 266, 268.** Compare *Johnson v. Ale-shire*, 130 App. Div. 178, 114 N. Y. Supp. 398. See also *supra*, **797.**

**1030 n. 84.** Change of name of assignor, in action on assigned claim, is allowable. *Thompson v. Young*, 53 Misc. 250, 103 N. Y. Supp. 200.

**1031.** A new cause of action cannot be added by amendment where such new cause of action is barred by limitations, so as to preclude a plea of the statute. *Dobbs v. Pearl*, 118 N. Y. Supp. 485. Facts which, under a recent decision of the Court of Appeals, plaintiff deems necessary to add to insure the retention of jurisdiction of the action by the Supreme Court, may be set up by amendment. *Meeks v. Meeks*, 79 App. Div. 49, 79 N. Y. Supp. 718. The complaint may be amended by specifying the charge of negligence with greater detail (*Straus v. Buchman*, 96 App. Div. 270, 89 N. Y. Supp. 226); or by substituting for an allegation of full performance of the contract an allegation of part performance and an excuse for the nonperformance (*Barnum v. Williams*, 91 App. Div. 464, 86 N. Y. Supp. 821), or so as to permit a recovery of the damages resulting from the breach of the contract intermediate the commencement of the action and the trial thereof (*Durham v. Hastings Pavement Co.*, 95 App. Div. 360, 362, 88 N. Y. Supp. 835); or so as to allege the substitution of other materials in place of those called for by the contract. *Poerschke v. Horowitz*, 84 App. Div. 443, 82 N. Y. Supp. 742.

**1031 n. 92.** But see *Demuth Glass Mfg. Co. v. Early*, 131 App. Div. 203, 115 N. Y. Supp. 672 (holding that an

admission of liability in a certain amount cannot be withdrawn by amendment).

1031 n. 96. *Henneke v. Schmidt*, 121 App. Div. 516, 106 N. Y. Supp. 138.

1032. Where complaint alleged agreement in writing and evidence showed account stated by implication, defendant held entitled to amend answer so as to set up limitations, statute of frauds, etc. *Lord & Taylor v. Hatch*, 149 App. Div. 603, 133 N. Y. Supp. 1068. No necessity for amendment to conform to the proof where no objection made that evidence is not within the pleadings. *Rothschild v. Harris*, 125 N. Y. Supp. 41. An amendment is proper to conform the complaint to the proof as to date of the injury sued for, where defendant makes no claim of surprise. *Ladrick v. Village of Green Island*, 103 App. Div. 71, 92 N. Y. Supp. 622. The allegation that notice of intention to sue was given to the corporation counsel may be amended to conform to the proof by adding "prior to the commencement of the action." *Shaw v. City of N. Y.*, 83 App. Div. 212, 214, 82 N. Y. Supp. 44.

1032 n. 98. *Clark v. Brooklyn Heights R. Co.*, 78 App. Div. 478, 79 N. Y. Supp. 811. The amendment may be allowed at the close of the trial. *Dunham v. Hastings Pavement Co.*, 95 App. Div. 360, 363, 88 N. Y. Supp. 835. Laches should be excused. *Kenney v. South Shore Natural Gas & Fuel Co.*, 126 App. Div. 236, 110 N. Y. Supp. 503.

1032 n. 99. *Topia Mining Co. v. Warfield*, 148 App. Div. 139, 132 N. Y. Supp. 1051; *Walde Asphalt Paving Co. v. City of New York*, 191 N. Y. 244, 84 N. E. 83; *Baumann v. Tannenbaum*, 125 App. Div. 770, 110 N. Y. Supp. 108; *Cullen v. Battle Island Paper Co.*, 124 App. Div. 113, 108 N. Y. Supp. 921; *Deering v. Schreyer*, 110 App. Div. 200, 97 N. Y. Supp. 14; *Smith v. Auburn*, 88 App. Div. 396, 84 N. Y. Supp. 725; *Scarry v. Metropolitan St. R. Co.*, 39 Misc. 802, 81 N. Y. Supp. 284.

**1032 n. 100.** Where defendant elected to proceed with the trial after the court had stated that the complaint could be amended to conform to the proof, and no request was made to have the amended complaint filed at once or to be allowed to file an answer thereto, defendant cannot complain of the failure to postpone the trial or to require the amendment to be written out so as to enable the defendant to inspect it before proceeding with the trial. *Bovee v. International Paper Co.*, 108 App. Div. 94, 95 N. Y. Supp. 426.

**1032 n. 101.** See also *Carlisle v. Barnes*, 102 App. Div. 582, 92 N. Y. Supp. 924.

**1033 n. 105.** *Rockmore v. Kramer*, 108 N. Y. Supp. 553; *Fiorito v. Interurban St. R. Co.*, 48 Misc. 614, 95 N. Y. Supp. 528.

**1033 n. 107.** *Rowe v. Gerry*, 86 App. Div. 349, 83 N. Y. Supp. 740; *Zeiser v. Cohn*, 44 Misc. 462, 474, 90 N. Y. Supp. 66; *Page v. Delaware & H. Canal Co.*, 76 App. Div. 160, 78 N. Y. Supp. 454; *Bjorkegren v. Kirk*, 53 Misc. 560, 103 N. Y. Supp. 994. Contra, *Audley v. Townsend*, 49 Misc. 23, 96 N. Y. Supp. 439.

**1033 n. 111.** *Zeiser v. Cohn*, 44 Misc. 462, 474, 90 N. Y. Supp. 66.

**1034.** Whether amendment sets up new cause of action, see *Ubert v. Schonger*, 144 App. Div. 696, 129 N. Y. Supp. 545; *Mandy v. Schleicher Co.*, 142 App. Div. 23, 126 N. Y. Supp. 571; *Gropp v. Great Atlantic, etc., Tea Co.*, 141 App. Div. 372, 126 N. Y. Supp. 211. Whether amendment in action by passenger against carrier for assault changes cause of action, see *Connell v. N. Y., Ontario, etc., Ry. Co.*, 134 App. Div. 231, 118 N. Y. Supp. 944.

**1035 n. 124.** *Coyle v. Davidson*, 92 App. Div. 322, 86 N. Y. Supp. 1089. An amendment which merely amplifies the complaint by setting forth more fully the grounds on which the defendant is liable, and the items of damage, is proper. *Id.*

**1035 § 904.** The Special Term has power, after the entry of an interlocutory judgment and during the pendency of a reference directed by such interlocutory judgment, to allow an amendment of the complaint, by enlarging the cause of action, but in such case all proceedings fall and a new trial under the amended complaint is necessary. *Wilson v. Standard Asphalt Co.*, 81 App. Div. 102, 81 N. Y. Supp. 8.

**1035 n. 127.** *Rosenberg v. Feiering*, 124 App. Div. 522, 108 N. Y. Supp. 941 [citing 1 *Nichols' New York Pr.* 1035].

**1036.** The statute of limitations, where it operates on the liability and not merely on the remedy, may be allowed to be interposed by amendment before a second trial. *Colell v. Delaware, L. & W. R. Co.*, 80 App. Div. 342, 80 N. Y. Supp. 675. Amendment of complaint by appellate court, see *Thrall v. Cuba Village*, 88 App. Div. 410, 415, 84 N. Y. Supp. 661. The appellate court cannot amend to conform to the proof where evidence was objected to in lower court as not admissible under the pleadings. *Page v. Delaware & H. Canal Co.*, 76 App. Div. 160, 78 N. Y. Supp. 454.

**1036 n. 136.** *Leslie v. Grover*, 116 N. Y. Supp. 868; *P. H. & F. M. Roots Co. v. New York Foundry Co.*, 54 Misc. 635, 104 N. Y. Supp. 785. Compare *Fraenkel v. Friedman*, 58 Misc. 451, 111 N. Y. Supp. 436. Otherwise where evidence objected to. *Audley v. Townshend*, 126 App. Div. 431, 110 N. Y. Supp. 575. Different where cause of action changed. *Epstein v. Cohen*, 56 Misc. 579, 107 N. Y. Supp. 148. Objection made toward end of trial, after a great deal of such evidence had been admitted without objection, is too late. *Apgar v. Connell*, 79 Misc. 531, 140 N. Y. Supp. 705.

**1036 n. 139.** But on appeal court will not amend by striking words "as executrix." *Ehrman v. Bassett*, 159 App. Div. 753, 144 N. Y. Supp. 976.

**1037 n. 141.** *New York v. Knickerbocker Trust Co.*,

121 App. Div. 740, 106 N. Y. Supp. 506; *Hill v. Weidinger*, 110 App. Div. 683, 97 N. Y. Supp. 473; *Electric Boat Co. v. Howey*, 88 App. Div. 522, 85 N. Y. Supp. 95. See *Nathan v. Woolverton*, 149 App. Div. 791, 134 N. Y. Supp. 469.

**1037 n. 142.** After trial amount may be increased by amendment in action for damages. *Sohman v. Metropolitan St. R. Co.*, 56 Misc. 342, 106 N. Y. Supp. 1033.

**1037 § 905.** A party cannot combine in a single motion an application for leave to serve both an amended and supplemental pleading. *Washington Life Ins. Co. v. Scott*, 52 Misc. 639, 103 N. Y. Supp. 929. Where there is a variance, application may be made to the Special Term. *Cody v. Dickinson*, 159 App. Div. 234, 144 N. Y. Supp. 458. If court has no jurisdiction of cause of action, it cannot grant leave to amend. *Hackett v. Strumpf*, 156 App. Div. 58, 141 N. Y. Supp. 172.

**1037 n. 146.** *Danzig v. Barody*, 140 App. Div. 542, 125 N. Y. Supp. 797. But see *Bailey v. Kraus*, 39 Misc. 845, 81 N. Y. Supp. 492. Where the motion, made before trial, was denied for laches, it should not thereafter be granted after a reversal of the judgment on appeal. *A. & S. Henry & Co. v. Talcott*, 89 App. Div. 76, 85 N. Y. Supp. 98.

**1037 n. 147.** Laches in moving, see *Crowley v. La Brake*, 147 App. Div. 389, 132 N. Y. Supp. 155.

**1037 n. 148.** It is not necessarily error to permit an amendment "at the trial," to set up special damages, where defendant chooses to proceed instead of asking for a postponement of the trial and excepting to the ruling if the motion was denied. *Werner v. Hearst*, 76 App. Div. 375, 384, 78 N. Y. Supp. 788.

**1037 n. 149.** See also *Coyle v. Davidson*, 92 App. Div. 322, 325, 86 N. Y. Supp. 1089.

**1037 n. 150.** *Luckey v. Mockridge*, 112 App. Div. 199, 98 N. Y. Supp. 335.

**1038.** Affidavit necessary. *Danzig v. Barody*, 140

App. Div. 542, 125 N. Y. Supp. 797. The attorney should make the affidavit, instead of the client, where the inadvertence or neglect sought to be excused is that of the attorney. *Kent v. Aetna Ins. Co.*, 88 App. Div. 518, 85 N. Y. Supp. 164.

**1038 n. 151.** *Robinson v. Thomas*, 115 N. Y. Supp. 921. Not necessary where amendment is merely of prayer for relief. *McVey v. Security Mut. Life Ins. Co.*, 118 App. Div. 466, 103 N. Y. Supp. 1056. Service of amended pleading, by leave of court, after the hearing of the application, held sufficient in *Kent v. Aetna Ins. Co.*, 88 App. Div. 518, 85 N. Y. Supp. 164.

**1038 n. 152.** *Quarantiello v. Grand Trunk R. Co.*, 145 App. Div. 138, 129 N. Y. Supp. 109; *Driscoll v. Parker Pen Co.*, 141 N. Y. Supp. 251; *Dubroff v. North River Ins. Co.*, 121 N. Y. Supp. 227; *Lent v. Title Ins. Co. of New York*, 117 N. Y. Supp. 901; *Haskell v. Moran*, 117 App. Div. 251, 102 N. Y. Supp. 388, 103 N. Y. Supp. 667; *A. & S. Henry & Co. v. Talcott*, 89 App. Div. 76, 85 N. Y. Supp. 98; *Mutual Loan Ass'n v. Lesser*, 81 App. Div. 138, 80 N. Y. Supp. 1112; *Kent v. Aetna Ins. Co.*, 88 App. Div. 518, 85 N. Y. Supp. 164; *Treadwell v. Clark*, 45 Misc. 268, 92 N. Y. Supp. 166. Where the facts are peculiarly within the attorney's knowledge, and he so states in the affidavit, it may, it seems, be made by him. *Mosseim v. Empire State Surety Co.*, 112 App. Div. 69, 98 N. Y. Supp. 144.

**1038 n. 154.** *Pratt, Hurst & Co. v. Tailor*, 99 App. Div. 236, 90 N. Y. Supp. 1023; *Barnum v. Williams*, 91 App. Div. 464, 468, 86 N. Y. Supp. 821; *Mutual Loan Ass'n v. Lesser*, 81 App. Div. 138, 80 N. Y. Supp. 1112. See also *Lederer v. Adler*, 51 Misc. 572, 101 N. Y. Supp. 53. That it is sufficient to refer to proposed amended pleading for the facts, such pleading being on information and belief without stating the sources of the information, see *Meeks v. Meeks*, 79 App. Div. 49, 79 N. Y. Supp. 718.

**1039 n. 161.** Want of knowledge of the subject of the amendment at the time the pleading was interposed should be shown. *Barnum v. Williams*, 91 App. Div. 464, 468, 86 N. Y. Supp. 821.

**1039 § 906.** In furtherance of justice, amendment of complaint allowed after two reversals. *Gropp v. Great Atl. & Pac. Tea Co.*, 83 Misc. 374, 145 N. Y. Supp. 959. Amendment to admit evidence appellate court has held not within the issues not regarded with favor. *Porter v. New York*, 83 Misc. 367, 145 N. Y. Supp. 938. That proposed amendment is at the suggestion of the trial court is not sufficient to warrant an amendment at the Special Term. *Quarantiello v. Grand Trunk R. Co.*, 145 App. Div. 138, 129 N. Y. Supp. 109. Pendency of another action as ground for denying amendment, see *Dudley v. Platt*, 70 Misc. 322, 127 N. Y. Supp. 154. Where a plaintiff has served three complaints, each of which the court has held did not state a cause of action, he should not be permitted to serve a fourth one, unless facts are set forth from which the court can see that the plaintiff has a cause of action and some explanation given why said facts have not theretofore been pleaded. *Mitchell v. Dunmore Realty Co.*, 132 App. Div. 180, 116 N. Y. Supp. 812.

**1039 n. 162.** Matter of Prentice, 155 App. Div. 480, 139 N. Y. Supp. 1027; *Braker v. New York Finance Co.*, 132 N. Y. Supp. 1039; *Jones v. Gould*, 130 App. Div. 451, 114 N. Y. Supp. 956; *Riesgo v. Glengariffe Realty Co.*, 116 App. Div. 414. Two years' delay in moving was held excusable in *Blackburn v. American News Co.*, 89 App. Div. 82, 85 N. Y. Supp. 440. Lapse of two and a half years after service of complaint. *Connell v. N. Y. Ontario, etc., Ry. Co.*, 134 App. Div. 231, 118 N. Y. Supp. 944.

**1039 n. 163.** *Herbert v. De Murias*, 115 App. Div. 453, 101 N. Y. Supp. 381. See *Williams Engineering, etc., Co. v. New York*, 150 App. Div. 676, 135 N. Y. Supp. 778.

**1039 n. 165.** *Jacobs v. Mexican Sugar Refining Co.*, 115 App. Div. 499, 101 N. Y. Supp. 320; *Mutual Loan Ass'n v. Lesser*, 81 App. Div. 138, 80 N. Y. Supp. 1112.

**1039 n. 166.** Rule applied to defendant. *Hamilton v. Thaw*, 3 Current Ct. Dec. 25.

**1039 n. 167.** The official citation is 82 App. Div. 145, 81 N. Y. Supp. 701.

**1040.** Sufficiency of original pleading cannot be determined on motion to amend it. *Merrihen v. Kingsbury*, 150 App. Div. 40, 134 N. Y. Supp. 452.

**1040 n. 174.** *Greater New York Film Rental Co. v. Motion Picture Patents Co.*, 157 App. Div. 906, 142 N. Y. Supp. 356; *Colwell Lead Co. v. Home Title Ins. Co.*, 154 App. Div. 92, 138 N. Y. Supp. 744.

**1041.** If proposed amended answer states no defense, leave to serve it should be refused. *McNichol v. Phillips*, 131 N. Y. Supp. 726.

**1041 n. 176.** *Colwell Lead Co. v. Home Title Ins. Co.*, 154 App. Div. 92, 138 N. Y. Supp. 744.

**1042 § 907.** Need not require service of new summons, in conformity to the amendment relating to the capacity in which plaintiff sues. *Johnson v. Phoenix Bridge Co.*, 121 N. Y. Supp. 699. Order for material amendment of complaint should not provide that answer be deemed amended so as to deny the allegation added by the amendment. *Connell v. N. Y., Ontario, etc., Ry. Co.*, 134 App. Div. 231, 118 N. Y. Supp. 944. The fact the plaintiff applies for an amendment of his complaint and then fails to accept it under the terms imposed by the court does not estop him from urging what was sought to be presented by the amendment. *Paltey v. Egan*, 200 N. Y. 83, 93 N. E. 267. On allowing an amendment of the complaint after the withdrawal of a juror at the close of the case, the payment of all taxable costs to the date of the motion should be required. *Palazzo v. Degnon-MacLean Cont. Co.*, 115 App. Div. 172, 100 N. Y. Supp.



681. Where an amendment, on a second trial, was conditioned on the payment of all costs subsequent to the service of the complaint, the costs of the former action cannot be taxed although the former judgment was reversed with costs to abide the final award of costs. *Rowe v. Gerry*, 109 App. Div. 156, 95 N. Y. Supp. 859. The question whether costs should be imposed is necessarily involved in the motion to amend, and a second motion therefor is improper. *Abrahams v. Finkelstein*, 49 Misc. 448, 97 N. Y. Supp. 987.

1042 n. 191. *Callahan v. New York Cent. & H. R. R. Co.*, 99 App. Div. 56, 90 N. Y. Supp. 657.

1043 n. 196. It is only where the amendment is merely formal that service may be dispensed with. *Abrahams v. Finkelstein*, 49 Misc. 448, 97 N. Y. Supp. 987.

1043 n. 204. See also *Ward v. Terry & Tench Cont. Co.*, 118 App. Div. 80; *National Gum & Mica Co. v. Century Paint & W. P. Co.*, 117 App. Div. 267, 102 N. Y. Supp. 327; *Abrahams v. Finkelstein*, 49 Misc. 448, 97 N. Y. Supp. 987. On allowing an amendment of the complaint, payment of all costs after the service of the complaint should be imposed. *Lindblad v. Lynde*, 81 App. Div. 603, 81 N. Y. Supp. 351. "The purpose of imposing terms as a condition of amendment is to recompense a party for the additional labor devolved upon it by reason of such amendment." *Kyle v. New York City*, 155 App. Div. 401, 402, 139 N. Y. Supp. 1034.

1044. Leave to amend should be granted by Special Term, after juror withdrawn, only on payment of full costs. *Smith v. Luckenbach*, 158 App. Div. 485, 143 N. Y. Supp. 592. Full costs of action to date may be required in a proper case, on allowing answer to be amended. *Douras v. Wagner*, 155 App. Div. 928, 141 N. Y. Supp. 1111. Where a juror was withdrawn to permit application to the Special Term to amend the answer, the Special Term, as a condition of grant-

ing the order, should require defendant to pay the costs of the action to date. *U. S. Drainage & Irrig. Co. v. Lucas*, 156 App. Div. 49, 141 N. Y. Supp. 50. On allowing amendment of complaint, where it requires both defendants to plead anew, payment of costs to both defendants should be required. *Russo v. Lordi*, 69 Misc. 330, 125 N. Y. Supp. 412. If amendment to complaint, granted at Special Term, materially changes the cause of action, payment of all prior costs, including costs of appeal, should be required. *Lifshitz v. Minsher Benevolent Soc.*, 67 Misc. 231, 124 N. Y. Supp. 596. Amendment of complaint at Special Term as to formal defects should be conditioned on payment of motion costs rather than the costs of the action. *Kessler v. Pettet*, 67 Misc. 573, 124 N. Y. Supp. 815. When motion costs only should be imposed, see *Lord & Taylor v. Hatch*, 149 App. Div. 603, 133 N. Y. Supp. 1068. Where Special Term permits amendment of complaint, allowance of \$10 motion costs held sufficient where defendant has paid \$30 as condition of withdrawal of juror. *O'Beirne v. Kelly*, 68 Misc. 134, 124 N. Y. Supp. 948. Where a juror was withdrawn, and the complaint allowed to be amended at Special Term by merely alleging additional personal injuries, the granting of motion costs was held adequate, the juror having been withdrawn because defendant claimed surprise. *Kyle v. New York*, 155 App. Div. 401, 139 N. Y. Supp. 1080. Terms are not so discretionary as not to be reviewable. *Rosenberg v. Feiring*, 124 App. Div. 522, 108 N. Y. Supp. 941. Where plaintiff moves to withdraw a juror and for leave to amend the complaint, payment of taxable costs and disbursements to date should be required. *Box Board & Lining Co. v. John H. Weimers*, 108 N. Y. Supp. 662. Where a judgment for plaintiff was reversed, an order allowing an amendment of the complaint by a new allegation of negligence should require payment of all costs after service of answer. *Woolsey v. Brooklyn Heights R. Co.*, 129 App. Div. 410, 113

N. Y. Supp. 245. The fact that the objection which appeared on the face of the complaint was not taken by demurrer or answer should, it seems, be taken into consideration in fixing the terms on allowing an amendment of the complaint. *Mooney v. Valentine*, 79 App. Div. 41, 79 N. Y. Supp. 698. Repayment of costs of demurrer held improper in *Kent v. Aetna Ins. Co.*, 88 App. Div. 518, 85 N. Y. Supp. 164.

**1044 n. 206.** Rule applied where amendment is necessary to recovery but does not change the cause of action. *Lifshitz v. Minsker Benevolent Soc.*, 67 Misc. 231, 124 N. Y. Supp. 596. Generally where substantial amendments are allowed after an unsuccessful trial, the other party should be reimbursed for taxable costs and disbursements made since the pleading amended was served. *Lyall v. Wood*, 130 App. Div. 294, 114 N. Y. Supp. 272. Where amendment to complaint does not change cause of action, costs need not be imposed. *Smith v. Excelsior Brewing Co.*, 154 App. Div. 896, 138 N. Y. Supp. 1143.

**1044 n. 210.** See *Baum v. Elias*, 64 Misc. 43, 117 N. Y. Supp. 935. Amending complaint by increasing damages. *Pomeroy Co. v. Wells Bros. Co.*, 149 App. Div. 673, 134 N. Y. Supp. 353.

**1044 n. 212.** *Dose v. Hirsch Bros.*, 67 Misc. 229, 124 N. Y. Supp. 595; *Dunham v. Hastings Pavement Co.*, 109 App. Div. 514, 96 N. Y. Supp. 313; *Kerrigan v. Peters*, 108 App. Div. 292, 95 N. Y. Supp. 723, where amendment made action against defendants personally instead of as executors. *Meeks v. Meeks*, 79 App. Div. 49, 79 N. Y. Supp. 718.

**1044 n. 214.** *Bruns v. Brooklyn Citizen*, 98 App. Div. 316, 90 N. Y. Supp. 701.

**1044 n. 215.** See also *Thomas v. Springer*, 139 App. Div. 678, 124 N. Y. Supp. 435. In such a case it is the duty of the court to impose such costs. *Manhattan Rolling Mill v. Dellon*, 63 Misc. 48, 116 N. Y. Supp. 583; *Carpenter*

v. Atlas Improvement Co., 132 App. Div. 112, 116 N. Y. Supp. 454; Audley v. Townsend, 131 App. Div. 79, 115 N. Y. Supp. 145; Paltey v. Egan, 58 Misc. 345, 111 N. Y. Supp. 13; Rosenberg v. Feiring, 124 App. Div. 522, 108 N. Y. Supp. 941. See House v. Carr, 52 Misc. 648, 103 N. Y. Supp. 929. Fifty dollars imposed as condition in Steinbach v. Prudential Ins. Co., 92 App. Div. 440, 87 N. Y. Supp. 107. Where the cause of action was not changed, fifty dollars' costs was held sufficient in Miller v. Carpenter, 79 App. Div. 130, 80 N. Y. Supp. 82. The rule is well settled in the second department that the court cannot amend a complaint after trial and appeal without imposing upon the applicant as a condition the payment of the costs and disbursements of the action to the date of the granting of the relief sought. Purcell v. Hoffman House, 131 App. Div. 239, 115 N. Y. Supp. 778.

**1045.** Terms that amendment should not affect testimony already taken before a referee or change the date of joinder of issue held proper. Williams Engineering, etc., Co. v. New York, 150 App. Div. 676, 135 N. Y. Supp. 778. On granting an amendment at Special Term, after a juror has been withdrawn, where the amendment in no way changes the cause of action, it is proper to provide that the issue shall remain as of the original date. Kyle v. New York, 155 App. Div. 401, 139 N. Y. Supp. 1080. On granting an amendment to the complaint, where the cause of action is not changed, it is proper to order that the answer stand as an answer to the amended complaint. Kyle v. New York, 155 App. Div. 401, 139 N. Y. Supp. 1080. Under certain circumstances, it is error to allow an amendment without adequate terms and without giving defendant an opportunity to answer the pleading as amended and to move for a change of the place of trial. Danzig v. Baroody, 140 App. Div. 542, 125 N. Y. Supp. 797. On allowing an amendment of the answer, setting up limitations, over a year after the

answer was filed, and after the case was marked "ready" on the day calendar, plaintiff should be allowed the alternative of discontinuance without costs. *Sire v. Shubert*, 155 App. Div. 927, 140 N. Y. Supp. 841. The court may provide that the case shall retain its place on the calendar. *Mossein v. Empire State Surety Co.*, 117 App. Div. 820, 102 N. Y. Supp. 1012. On allowing an amendment radically changing the cause of action, the defendant should be relieved from his waiver of a jury trial. *Reese v. Baum*, 83 App. Div. 550, 82 N. Y. Supp. 157. Where a juror is withdrawn and plaintiff allowed to apply at Special Term for an amendment, the requiring, as a condition of allowing an amendment in effect stating a new cause of action, of payment of only ten dollars costs and compelling defendants to answer in five days and restoring the case to its place on the day calendar is improper. Payment of trial fee in addition to ten dollars costs, twenty days to answer, and allowing case to take its regular place on the calendar but not to be restored to the day calendar, was ordered by the Appellate Division. *Diebold v. Walter*, 83 App. Div. 254, 82 N. Y. Supp. 37. Effect of requiring action to retain position on the calendar, on allowing amendment of answer on motion to compel plaintiff to serve a reply, see *Hollenborg v. Greene*, 87 App. Div. 259, 84 N. Y. Supp. 219.

1045 n. 218. See *Crowley v. La Brake*, 147 App. Div. 389, 132 N. Y. Supp. 155.

1046 § 908. A default entered for failure to appear is not affected by the subsequent filing of an amended answer as of course. *Lauger v. Swasey*, 54 Misc. 301, 103 N. Y. Supp. 1086. Amended complaint should be served on a defendant although he is in default in the service of his answer. *Steinman v. Hemens*, 3 Current Ct. Dec. 39.

1046 n. 230. Where demurrer is interposed to one of several causes of action, and leave is given to amend, the leave to amend extends only to the cause of action attacked.

*Genung v. Hawkes*, 147 App. Div. 380, 132 N. Y. Supp. 274.

**1046 n. 231.** Motion should be to strike out part which does not comply with the order. *Whitman v. Morris*, 152 App. Div. 97, 136 N. Y. Supp. 596. But where, on demurrer to one of several causes of action, leave to amend was granted on sustaining the demurrer, but the amended complaint amended all the causes of action, the proper practice is not to move to strike out the causes of action improperly amended, but either to refuse to accept service of the pleading, or move to strike out the unauthorized parts. *Genung v. Hawkes*, 147 App. Div. 380, 132 N. Y. Supp. 274. But if leave to amend a pleading is granted, and part of the pleading as amended is clearly unauthorized by the order, the opposing party will not be compelled, on motion, to accept the pleading. *Mann v. Press Pub. Co.*, 135 App. Div. 361, 120 N. Y. Supp. 534.

**1047 n. 233.** Putting on the minutes statement of what words are stricken out and what inserted, see *Wyckoff, Church, etc., v. Huggins*, 121 N. Y. Supp. 382.

**1047 n. 237.** But see *Poerschke v. Horowitz*, 84 App. Div. 443, 82 N. Y. Supp. 742. Amended complaint is properly served where a copy of it is served with the moving papers and the order directed that it stand as the new pleading. *Tisdale v. Moore*, 146 App. Div. 561, 131 N. Y. Supp. 141. Where plaintiff refuses to accept an amended answer, motion should be made for leave to serve an amended answer and on affidavit of attorney to compel acceptance of such answer. *Lane v. Smyer*, 157 App. Div. 889 (mem.) 141 N. Y. Supp. 1128.

**1047 n. 238.** *Ullman v. Tanner*, 127 App. Div. 808, 111 N. Y. Supp. 844; *Brooks Bros. v. Tiffany*, 117 App. Div. 470, 102 N. Y. Supp. 626; *Lewis v. Pollack*, 85 App. Div. 577, 580, 83 N. Y. Supp. 287.

**1048.** An amendment to conform to the proof, on a  
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former trial, although no formal order is entered and no amended pleading served, enures to the benefit of the party on a second trial. *Stannard v. Reid & Co.*, 118 App. Div. 304, 103 N. Y. Supp. 521.

1048 n. 242. *Serrell v. Forbes*, 106 App. Div. 482, 94 N. Y. Supp. 805.

1048 n. 249. *Michigan Steamship Co. v. American Bonding Co.*, 109 App. Div. 55, 95 N. Y. Supp. 1034.

## CHAPTER VII

### SUPPLEMENTAL PLEADINGS

1050 n. 2. This method is not exclusive as the substituted defendant may be brought in by former under section 75 of the Code. *Citizens' Nat. Bank v. Bang*, 112 App. Div. 748, 99 N. Y. Supp. 76.

1050 n. 6. Code provision is now Cons. Laws, c. 23, § 109.

1051 n. 7. *Ducas v. Loonen*, 158 App. Div. 915, 143 N. Y. Supp. 1114; *Le Boeuf v. Gray*, 42 Misc. 632, 87 N. Y. Supp. 597. See also *Aex v. Allen*, 107 App. Div. 182, 94 N. Y. Supp. 844. Facts occurring after the commencement of the action but before the expiration of the time to answer need not be set up by supplemental answer but may be alleged in the original answer. *Burke v. Rhoads*, 82 App. Div. 325, 81 N. Y. Supp. 1045.

1051 n. 9. But see *Horowitz v. Goodman*, 112 App. Div. 13, 98 N. Y. Supp. 53.

1051 n. 10. *Industrial & General Trust v. Tod*, 93 App. Div. 263, 273, 87 N. Y. Supp. 687.

1052. Applications are treated liberally where no injustice or unconscionable delay will result. *Merrihen v. Kingsbury*, 150 App. Div. 40, 134 N. Y. Supp. 452.

1052 n. 13. Admission of "due and timely" service of

the pleading waives the failure to obtain leave of court. *Greenblatt v. Mendelsohn*, 46 Misc. 554, 92 N. Y. Supp. 963.

**1052 n. 14.** Discretion must be exercised reasonably. *Park & Sons Co. v. Hubbard*, 198 N. Y. 136, 91 N. E. 261 [aff. 134 App. Div. 468.] Motion will not be denied on theory that a cause of action is not stated in the original pleading nor on the theory that it will be of no avail. *Brewster v. Brewster Co.*, 138 App. Div. 139, 122 N. Y. Supp. 1009.

**1052 n. 15.** *Sand v. Borman*, 134 App. Div. 651, 119 N. Y. Supp. 454; *Johnson v. Victoria Chief Copper Mining & Smelting Co.*, 60 Misc. 464, 113 N. Y. Supp. 1023.

**1052 n. 21.** But leave will not be denied because of allegations not germane to the original pleading. *Brewster v. Brewster Co.*, 138 App. Div. 139, 122 N. Y. Supp. 1019.

**1053 § 913.** Second supplemental complaint may be allowed in a proper case. *Jackson v. Rosenbrock*, 144 App. Div. 357, 128 N. Y. Supp. 1042. Reversal and subsequent new judgment should be allowed to be set up in a creditor's action. *Merrihew v. Kingsbury*, 150 App. Div. 40, 134 N. Y. Supp. 452. Acts of defendants for which plaintiff asks damages, occurring after original complaint was served, cannot be set up. *Park & Sons Co. v. Hubbard*, 198 N. Y. 136, 91 N. E. 261 [aff. 134 App. Div. 468]. No such pleading as an "amended and supplemental complaint" is authorized by the Code. *Horowitz v. Goodman*, 112 App. Div. 13, 98 N. Y. Supp. 53; *Luckey v. Mockbridge*, 112 App. Div. 199, 98 N. Y. Supp. 335; *Jones v. Ramsey*, 133 App. Div. 737, 118 N. Y. Supp. 134. In an action to recover a pledge, where it has become of no value pending an appeal, a supplemental complaint should be allowed on a new trial, alleging that fact and asking judgment for the value of the pledge at the time demand therefor was made. *Central Trust Co. v. West India Imp. Co.*, 109 App. Div. 517, 96 N. Y. Supp. 519.



**1053 n. 24.** *Lafayette Trust Co. v. Peck*, 133 App. Div. 370, 117 N. Y. Supp. 336. See *McNeil v. Board of Supervisors of Suffolk County*, 123 App. Div. 622, 108 N. Y. Supp. 178; *Hunt v. Provident Sav. Life Assur. Soc.*, 77 App. Div. 338, 79 N. Y. Supp. 74.

**1053 n. 25.** *Jones v. Ramsey*, 133 App. Div. 737, 118 N. Y. Supp. 134.

**1053 n. 26.** But in an action for separation on the ground of cruel and inhuman treatment, specific acts of cruelty occurring since the commencement of the action may be set up by supplemental answer. *Smith v. Smith*, 99 App. Div. 283, 90 N. Y. Supp. 927.

**1053 n. 27.** *South Shore T. Co. v. Town of Brookhaven*, 53 Misc. 392, 102 N. Y. Supp. 75.

**1053 n. 28.** *Smith v. Bach*, 82 App. Div. 608, 81 N. Y. Supp. 1057.

**1054 n. 31.** See also *Merrihew v. Kingsbury*, 150 App. Div. 40, 134 N. Y. Supp. 452.

**1054 § 914.** Counterclaim may be allowed to be set up by supplemental answer although it existed when the action was commenced, where events had not then occurred to entitle defendant to full relief. *Roemer v. 35% Automobile Supply Co.*, 135 N. Y. Supp. 410. Agreement for dissolution of partnership may be set up. *Gaskell v. Nolte*, 138 App. Div. 875, 123 N. Y. Supp. 442. Where a certain question submitted on agreed facts is determined pending the trial, leave should be granted to serve a supplemental answer setting up such determination. *Mishkind-Feinberg Realty Co. v. Sidorsky*, 115 App. Div. 115, 100 N. Y. Supp. 714. Leave to file a supplemental answer, setting up the exchange of consents to discontinue the action and the exchange of general releases by plaintiff to defendant, should be granted, to enable defendant to obtain an adjudication on a defense which he claims constitutes a bar to the action. *Tucker v. Dudley*, 93 N. Y. Supp. 355.

**1054 n. 33.** See *Van Kannel Revolving Door Co. v. Sloane*, 122 App. Div. 610, 107 N. Y. Supp. 507.

**1054 n. 35.** *National Gum & Mica Co. v. Century Paint & Wall Paper Co.*, 133 App. Div. 48, 117 N. Y. Supp. 712. It is no objection that the settlement was without the knowledge of plaintiff's attorney who had the case on a contingent fee. *Buser v. Jacobowsky*, 110 N. Y. Supp. 252.

**1055 n. 38.** *Franck v. Greene, Jr., Co.*, 136 App. Div. 380, 120 N. Y. Supp. 1015; *Sand v. Borman*, 134 App. Div. 651, 119 N. Y. Supp. 454; *Gleason v. Northwestern Mutual Life Ins. Co.*, 189 N. Y. 100, 81 N. E. 777 [affirming 118 App. Div. 906]; *Gleason v. Northwestern Mut. Life Ins. Co.*, 113 App. Div. 186, 98 N. Y. Supp. 991.

**1056 n. 47.** See *Jones v. Gould*, 56 Misc. 328, 107 N. Y. Supp. 661; *Mills v. Gold*, 79 Misc. 209, 139 N. Y. Supp. 846.

**1056 n. 48.** But leave should not be refused because the judgment "may" not constitute a bar. *Rio Tinto Copper Mining Co. v. Black*, 85 N. Y. Supp. 1116.

**1056 § 915.** Discharge in bankruptcy from judgment pleaded as a counterclaim may, in the discretion of the court, be pleaded by supplemental reply. *Wyckoff v. Williams*, 136 App. Div. 495, 121 N. Y. Supp. 189.

**1056 § 916.** Objection that court has no jurisdiction of action because defendant is a foreign corporation cannot be considered on motion for leave to serve supplemental complaint. *Johnson v. Victoria Chief Copper Mining & Smelting Co.*, 60 Misc. 464, 113 N. Y. Supp. 1023. Affidavit may be made by attorney where facts are within his personal knowledge. *Rosenbaum v. Breslauer*, 54 Misc. 76, 104 N. Y. Supp. 506.

**1056 n. 51.** See *Franck v. Greene, Jr., Co.*, 136 App. Div. 380, 120 N. Y. Supp. 1015. May be refused because of laches. *Jones v. Jones*, 99 App. Div. 267, 90 N. Y. Supp. 1002.

**1057.** After entry of final judgment, leave to serve sup-

plemental answer will be denied. *Apgar v. Connell*, 135 N. Y. Supp. 77.

**1057** n. 52. Special term has jurisdiction, pending trial at trial term, to allow supplemental answer pleading recovery in another action. *Jones v. Ramsey*, 127 App. Div. 704, 111 N. Y. Supp. 993.

**1057** n. 54. *Central Trust Co. v. West India Imp. Co.*, 109 App. Div. 517, 96 N. Y. Supp. 519. Delay of few months in interposing judgment of South Dakota was held not fatal in *Rio Tinto Copper Mining Co. v. Black*, 85 N. Y. Supp. 1116.

**1057** n. 56. *Rosenbaum v. Breslauer*, 54 Misc. 76, 104 N. Y. Supp. 506.

**1057** n. 57. *Central Trust Co. v. West India Imp. Co.*, 109 App. Div. 517, 96 N. Y. Supp. 519. But plaintiff may be allowed to serve what is really a supplemental complaint. *Trustees of Presbytery v. Westminster Presbyterian Church*, 142 App. Div. 867, 127 N. Y. Supp. 851.

**1057** n. 60. See *Jones v. Gould*, 56 Misc. 328, 107 N. Y. Supp. 661.

**1057** n. 61. *Trustees of Presbytery v. Westminster Presbyterian Church*, 142 App. Div. 867, 127 N. Y. Supp. 851.

**1058** n. 63. *Silver & Co. v. Waterman*, 122 App. Div. 373, 106 N. Y. Supp. 899.

**1058** n. 65. *Silver & Co. v. Waterman*, 122 App. Div. 373, 106 N. Y. Supp. 899 [citing 1 Nichols' New York Pr. 1058].

**1058** § 917. Leave to serve "an amended and supplemental complaint" should not be granted. *Horowitz v. Goodman*, 112 App. Div. 13, 98 N. Y. Supp. 53. Propriety of granting leave to file supplemental answer setting up a release without being charged with costs of action, see *Schmitz v. Wyckoff, Church & Partridge*, 128 App. Div. 324, 112 N. Y. Supp. 681.

**1058** n. 69. *Rosenbaum v. Breslauer*, 54 Misc. 76, 104 N. Y. Supp. 506. Motion for leave to serve supplemental complaint is properly granted on payment of costs to date. *Johnson v. Victoria Chief Copper Mining & S. Co.*, 60 Misc. 464, 113 N. Y. Supp. 1023; *Buser v. Jacobowsky*, 110 N. Y. Supp. 252. Requiring payment of fifteen dollars costs is inadequate. *Pickrell v. Mendel*, 87 App. Div. 163, 84 N. Y. Supp. 70. Where second supplemental complaint was allowed, conditions imposed were payment of costs subsequent to notice of trial, the trial fee and the trial disbursements. *Jackson v. Rosenbrock*, 144 App. Div. 357, 128 N. Y. Supp. 1042.

**1059** § 918. On bringing in the trustee in bankruptcy of the defendants as an additional defendant, it was held that the original and supplemental complaints, taken together, need not state a cause of action against the trustee, in *Latimer v. McKinnon*, 85 App. Div. 224, 83 N. Y. Supp. 315.

**1059** n. 75. *Mulligan v. O'Brien*, 119 App. Div. 355, 104 N. Y. Supp. 301; *Latimer v. McKinnon*, 85 App. Div. 224, 228, 83 N. Y. Supp. 315.

**1060**. If defendant has improperly demurred to a supplemental complaint, and has not answered, he should move at Special Term to open the default if he desires to put the supplemental facts in issue. *Bilder v. Ellis*, 148 App. Div. 647, 133 N. Y. Supp. 425. Where order does not provide that supplemental complaint shall take the place of the former pleading, failure to plead thereto in addition to the original answer is a default only as to the new allegations. *Cassassa v. Savarese*, 149 App. Div. 243, 133 N. Y. Supp. 657.

**1060** n. 82. *Bilder v. Ellis*, 148 App. Div. 647, 133 N. Y. Supp. 425 [aff. 75 Misc. 255, 133 N. Y. Supp. 425].

## CHAPTER VIII

## MOTIONS RELATING TO PLEADINGS

**1062.** It should be kept in mind that the motions enumerated herein, in so far as they relate to the complaint, cannot be made after defendant has obtained an extension of time to answer unless such right is reserved in the stipulation or order (Vol. I, p. 940). The court should not, on motion at Special Term, strike from a complaint all the allegations of special damages. Orderly practice requires, where the question arises as to whether the pleading states a cause of action or a defense, that it should be determined by a demurrer or upon a trial, either at the opening thereof, or when evidence is offered, or at the close of the case, by motion to the court. *Pavenstedt v. New York Life Ins. Co.*, 103 App. Div. 36, 92 N. Y. Supp. 583; *Fox v. Chapman*, 117 App. Div. 127, 102 N. Y. Supp. 378. Where a complaint consists of five pages, a motion to compel the paragraphs to be numbered will be granted. *Schultheis v. Fishman*, 62 Misc. 57, 115 N. Y. Supp. 102. When defendant should not be required to separate his answer into defense and counterclaim, see *Leibovitz v. Utopia Land Co.*, 107 N. Y. Supp. 135. Under § 768 of the Code as amended in 1911, by permitting motion to specify one or more kinds of relief in the alternative or otherwise, the notice of motion may combine a motion to make the complaint more definite and certain, to separately state causes of action, and for a bill of particulars. *Barrett Mfg. Co. v. Sergeant*, 149 App. Div. 1, 133 N. Y. Supp. 526.

**1062 § 920.** To this list must now be added motion under § 547 of the Code (added in 1908) for judgment on the pleadings (post, **1084 § 926.**)

**1063 § 921.** Propriety of granting in general, see *Mendelson v. Margulies*, 157 App. Div. 666, 142 N. Y. Supp.

825. A complaint should not be dismissed because indefinite. *Palmer v. Van Deusen*, 122 App. Div. 282, 106 N. Y. Supp. 707. Time, where material, may be required to be stated. *McGehee v. Cooke*, 55 Misc. 40, 105 N. Y. Supp. 60. A motion should not be granted where the meaning and application of the allegations are clear, the theory upon which plaintiffs rely is not obscure, and further particulars of time and place are not essential to a comprehensive statement of the cause of action. *Smith v. Irvin*, 45 Misc. 262, 92 N. Y. Supp. 170. In an action for services and materials, where there is no allegation as to the time the services were rendered or the materials furnished or when payments or demands therefor were made, the complaint should be required to be made more definite to enable defendant to plead limitations if the allegations warrant the defense. *Peters v. Huffert*, 159 App. Div. 829, 144 N. Y. Supp. 1068. Defendant, as president of a corporation, cannot be compelled to separately deny or admit allegations of the complaint, in an action for personal injuries, where he cannot be deemed to have knowledge thereof, and he has denied knowledge or information sufficient to form a belief. *Walsh v. Barrett*, 154 App. Div. 461, 139 N. Y. Supp. 68. Day of assignment required to be made definite. *Worden v. Ranger*, 121 N. Y. Supp. 271. Illustrations of propriety of granting in particular cases, see *Rothstein v. Phoenix Ins. Co.*, 122 N. Y. Supp. 209; *Uss v. Crane Co.*, 138 App. Div. 256, 123 N. Y. Supp. 94; *Seaman, Inc., v. Stirn*, 137 App. Div. 659, 122 N. Y. Supp. 659; *Cohen v. North River Ins. Co.*, 121 N. Y. Supp. 1119.

1063 n. 5. *Peters v. Miller*, 150 App. Div. 249, 134 N. Y. Supp. 881; *Pringle v. Mulholland*, 116 N. Y. Supp. 572; *Smythe v. Cleary*, 127 App. Div. 555, 111 N. Y. Supp. 872; *Leibovitz v. Utopia Land Co.*, 107 N. Y. Supp. 135; *Church v. Stevens*, 56 Misc. 572, 107 N. Y. Supp. 310; *Day v. Day*, 98 App. Div. 314, 90 N. Y. Supp. 680; *Citizens'*

Central Nat. Bank v. Munn, 49 Misc. 319, 99 N. Y. Supp. 191.

**1063** n. 6. See Babcock v. Auson, 122 App. Div. 73, 106 N. Y. Supp. 642. Failure to move binds party to strongest construction of pleading against him. Dwyer v. Corrugated Paper Products Co., 80 Misc. 412, 141 N. Y. Supp. 240.

**1063** n. 14. Madison Real Property & Security Co. v. Hutton, 155 App. Div. 891, 139 N. Y. Supp. 1104. See Barrett Mfg. Co. v. Sergeant, 149 App. Div. 1, 133 N. Y. Supp. 526.

**1064.** No ground for motion that compliance with the order would enable defendants to demur to the complaint. State Bank v. Herrmann, 153 App. Div. 885, 137 N. Y. Supp. 995.

**1064** n. 18. Will not be granted to require a general or special denial of each material allegation of the complaint where defendants cannot truthfully or safely do so. Glenn v. Union Buffalo Mills Co., 154 App. Div. 513, 139 N. Y. Supp. 70. An answer may be required to be made more definite as to what is denied and what is admitted. Borsuk v. Blauner, 93 App. Div. 306, 87 N. Y. Supp. 851.

**1064** n. 22. Gould v. McLaughlin, 112 N. Y. Supp. 518; Friedman v. Denousky, 122 App. Div. 258, 106 N. Y. Supp. 780; Harrington v. Stillman, 120 App. Div. 659, 105 N. Y. Supp. 75; Mutual Life Ins. Co. v. Grannis, 118 App. Div. 830, 103 N. Y. Supp. 835; Mullen v. Hall, 51 Misc. 59, 99 N. Y. Supp. 841. See also Viner v. James, 92 App. Div. 542, 87 N. Y. Supp. 257. Details of an agreement, as to whether verbal or written, and its date, should be obtained by a bill of particulars rather than a motion to make more definite. Bonta Hotel Co. v. Benedict, 133 N. Y. Supp. 462. Motion denied where facts sought to be obtained belonged more properly to a bill of particulars. Young v. White, 158 App. Div. 760, 143 N. Y. Supp. 931. Where the date

of an instrument relied on is not given, the remedy is to move to make the pleading more definite and certain rather than for a bill of particulars. *Pigone v. Lauria*, 115 App. Div. 286, 100 N. Y. Supp. 976. "It is only where the 'precise meaning or application' of an allegation of a pleading is indefinite and uncertain that the court can require the pleading to be amended. If the meaning and application of the allegation can be seen with reasonable certainty, an amendment should not be directed." *Dumar v. Witherbee, Sherman & Co.*, 88 App. Div. 181, 84 N. Y. Supp. 669; *Kavanaugh v. Commonwealth Trust Co.*, 45 Misc. 201, 91 N. Y. Supp. 967. Matters of time, place and circumstance, unless they constitute material parts of the cause of action or defense, are strictly within the provinces of a bill of particulars and must be obtained by that method rather than by a motion to make more definite and certain. *Dumar v. Witherbee, Sherman & Co.*, 88 App. Div. 181, 84 N. Y. Supp. 669; *Kavanaugh v. Commonwealth Trust Co.*, 45 Misc. 201, 91 N. Y. Supp. 967. When all that a party to an action really wants is a more particular statement of his opponent's claim for the purpose of narrowing the issues at the trial, or to prevent surprise, he should apply for a bill of particulars instead of moving to make more definite and certain. *Dumar v. Witherbee, Sherman & Co.*, 88 App. Div. 181, 84 N. Y. Supp. 669.

1064 n. 23. Such practice is improper. *Mutual Life Ins. Co. v. Grannis*, 118 App. Div. 830, 103 N. Y. Supp. 835; *Kavanaugh v. Commonwealth Trust Co.*, 45 Misc. 201, 91 N. Y. Supp. 967, in which Justice Spencer refers to the statement in the text, and states that the practice should be discouraged, if not condemned.

1065. The motion will not be denied because the moving papers contain an affidavit of merits. *McGehee v. Cooke*, 55 Misc. 40, 105 N. Y. Supp. 60. Motion to overrule answer as frivolous and for other and further relief is not sufficient



as notice of a motion to make the answer more definite and certain. *Erie R. Co. v. Hills*, 138 N. Y. Supp. 1088.

**1065 n. 25.** Rule as to time applies to City Court of New York. *Erie R. Co. v. Hills*, 139 N. Y. Supp. 1088. The rule that where pleading is served by mail, forty days is allowed to make the motion (*Borsuk v. Blauner*, 93 App. Div. 306, 87 N. Y. Supp. 851) is changed by the Code amendment (*ante*, **663 n. 70**).

**1065 n. 31.** Affidavits improper. *Deubert v. New York*, 126 App. Div. 359, 110 N. Y. Supp. 403.

**1066 § 922.** It is not the province of the court, on a motion to strike out allegations on the ground that they are irrelevant, to decide whether the evidence would be material or to decide as to the weight or effect to be given to it upon the trial. *Michigan Steamship Co. v. American Bonding Co.*, 109 App. Div. 55, 95 N. Y. Supp. 1034. If evidence would be admitted on the trial in support of the allegations sought to be stricken out as irrelevant, the motion should be denied. *Noval v. Haug*, 48 Misc. 198, 96 N. Y. Supp. 708. More latitude in pleading in equity suits than in actions at law. *Isaacs v. Salomon*, 159 App. Div. 675, 144 N. Y. Supp. 876. More latitude is allowed in equity pleadings than at law; but the presence of irrelevant, etc., matter in a complaint is more serious than in an answer. *Gutta-Percha, etc., Co. v. Holman*, 150 App. Div. 678, 135 N. Y. Supp. 766. Privileged communications are properly stricken out, in an action by a physician for services rendered. *Schamberg v. Whitman*, 75 Misc. 215, 135 N. Y. Supp. 262. Denials reiterated in affirmative defense must be stricken out before demurring. *Van Tuyl v. Robin*, 80 Misc. 360, 142 N. Y. Supp. 535.

**1066 n. 36.** *Kidder v. Port Henry Iron Ore Co.*, 151 App. Div. 348, 135 N. Y. Supp. 353; *Gutta-Percha, etc., Co. v. Holman*, 150 App. Div. 678, 135 N. Y. Supp. 766; *North River Savings Bank v. Buckley*, 130 N. Y. Supp. 787; Col-

onizers' Realty Co. of Brooklyn v. Shatzkin, 129 App. Div. 608, 114 N. Y. Supp. 74. The question presented by the motion to strike out allegations of the complaint is whether the allegations are irrelevant to the cause of action attempted to be set forth, and not whether they may be relevant to an issue which may thereafter be presented by the answer. Welcke v. Tragreser, 131 App. Div. 737, 116 N. Y. Supp. 161. Redundant. O'Rourke Engineering Co. v. Goodwin Car Co., 144 App. Div. 583, 129 N. Y. Supp. 764. Redundant matter should be stricken out although it may become relevant at the trial. Powers v. Ridder, 142 App. Div. 457, 126 N. Y. Supp. 820. Applied to answer in an action on insurance policy. Becker v. Colonial Life Ins. Co., 75 Misc. 213, 133 N. Y. Supp. 481. Allegations held properly stricken out, see Kolb v. Mortimer, 135 App. Div. 542, 120 N. Y. Supp. 543; Kent v. Standard Oil Co., 138 App. Div. 501, 122 N. Y. Supp. 1047.

**1066 n. 37.** Bradley v. Sweeny, 120 App. Div. 315, 105 N. Y. Supp. 296. See also People v. American Ice Co., 135 App. Div. 180, 120 N. Y. Supp. 41. The motion is not favored by the courts. Dinkelspiel v. New York Evening Journal Pub. Co., 91 App. Div. 96, 98, 86 N. Y. Supp. 375; Dalziel v. Press Pub. Co., 52 Misc. 207.

**1066 n. 38.** Parish v. Juckett, 147 App. Div. 424, 131 N. Y. Supp. 715; New York Central, etc., R. R. Co. v. New York, 135 App. Div. 331, 119 N. Y. Supp. 999; Indelli v. Lester, 130 App. Div. 548, 115 N. Y. Supp. 46; Dinkelspiel v. New York Evening Journal Pub. Co., 91 App. Div. 96, 98, 86 N. Y. Supp. 375; Westervelt v. New York Times Co., 91 App. Div. 72, 86 N. Y. Supp. 454; John Church Co. v. Parkinson, 86 App. Div. 163, 83 N. Y. Supp. 175; American Farm Co. v. Rural Pub. Co., 78 App. Div. 268, 79 N. Y. Supp. 911; Hanson v. Collier, 51 Misc. 496, 101 N. Y. Supp. 690; Citizens' Central Nat. Bank v. Munn, 49 Misc. 319, 99 N. Y. Supp. 191. See also Bingham v. Gaynor, 135 App.

Div. 426, 119 N. Y. Supp. 1010. Same is true where redundancy is ground. *Kidder v. Port Henry Iron Ore Co.*, 151 App. Div. 348, 135 N. Y. Supp. 353.

1066 n. 41. *Crotty v. Erie R. Co.*, 153 App. Div. 902, 137 N. Y. Supp. 1102; *Gibson v. McDonald*, 137 App. Div. 51, 123 N. Y. Supp. 504; *Burnside v. Indra Line*, 80 Misc. 414, 141 N. Y. Supp. 238; *W. T. Hanson Co. v. Collier*, 119 App. Div. 794, 104 N. Y. Supp. 787 [citing 1 *Nichols' Pr.* 1066]; *Tierney v. Helvetia Swiss Fire Ins. Co.*, 129 App. Div. 694, 114 N. Y. Supp. 139; *Noval v. Haug*, 48 Misc. 198, 96 N. Y. Supp. 708. In opposition to the rule laid down in the text is *Uggla v. Brokaw*, 77 App. Div. 310, 79 N. Y. Supp. 244 (which holds that where an entire count in an answer is redundant, as where it sets up a defense provable under the general issue which has been pleaded, it may be stricken out). Rule applied to counterclaim. *Arnold v. Arnold*, 134 App. Div. 758, 119 N. Y. Supp. 451. Though it is evident the denial of a motion to strike out may work great hardship and injustice to the plaintiff in forcibly compelling him to go to the expense of taking by commission evidence which will be inadmissible on the trial, under the established rules of law governing the striking out of separate pleas as redundant and irrelevant, the order, so far as it strikes out the separate defense in a paragraph, cannot be sustained, since an entire defense cannot be stricken out as irrelevant. *Burnside v. Indra Line, Ltd.*, 80 Misc. 414, 417, 141 N. Y. Supp. 238.

1066 n. 42. The purpose of the motion is not to test the validity of a defense. *Rankin v. Bush-Brown*, 108 App. Div. 294, 95 N. Y. Supp. 719; *Rankin v. Bush*, 108 App. Div. 295, 95 N. Y. Supp. 718.

1066 n. 43. Facts which constitute a defense may not be stricken out as scandalous; but, on the other hand, facts pleaded as a complete defense, which would be demurrable as constituting only a partial defense, or as be-

ing at most in mitigation of damages, may be stricken out as scandalous upon the theory that the party aggrieved thereby should not be required to admit the truth of the allegations by demurring thereto. *Persch v. Weideman*, 106 App. Div. 553, 94 N. Y. Supp. 800.

**1067.** Denials should not be stricken out of a defense as irrelevant and redundant where the defense is necessarily based on a denial of some of the allegations of the complaint. *Mendelson v. Margulies*, 157 App. Div. 666, 142 N. Y. Supp. 825. But a specific denial improperly included in an affirmative defense may be stricken out. *Haffen v. Tribune Ass'n*, 126 App. Div. 675, 111 N. Y. Supp. 225; *Benjamin v. White*, 55 Misc. 530, 105 N. Y. Supp. 991; *Burnham v. Franklin*, 44 Misc. 299, 89 N. Y. Supp. 917; *Dinkelspiel v. New York Evening Journal Pub. Co.*, 91 App. Div. 96, 100, 86 N. Y. Supp. 375. A reiteration, in a "defense," of "all the admissions and denials" in preceding paragraphs, will be stricken out as irrelevant and redundant. *Blaut v. Blaut*, 41 Misc. 572, 85 N. Y. Supp. 146. So a denial of mere conclusion of law is properly stricken out. *Wood v. Scudder*, 155 App. Div. 254, 140 N. Y. Supp. 284. An answer is evasive where it shifts the time to which its allegations relate to a date much later than the date of the verification of the complaint to which time the allegations of the complaint relate. *Straus v. American Publishers' Ass'n*, 96 App. Div. 315, 316, 89 N. Y. Supp. 172. Matter irrelevant as to the moving defendant should not be stricken out where it is material to the cause of action alleged against the other defendants. *Brown v. Fish*, 76 App. Div. 329, 78 N. Y. Supp. 414. If relevant, matter cannot be stricken out because scandalous, on motion to strike out as redundant, irrelevant, and scandalous. *Bell v. Clarke*, 45 Misc. 275, 92 N. Y. Supp. 411. Allegations in a complaint in an action on a contract, setting out the various steps, including the legal instruments, by which plaintiff became vested

with the rights of one of the parties to the contract, will not be stricken out as redundant though a general allegation might have sufficed. *Pope Mfg. Co. v. Rubber Goods Mfg. Co.*, 100 App. Div. 353, 91 N. Y. Supp. 826.

**1067 n. 44.** A defendant is a person aggrieved, within § 545 of the Code, who may move to strike out part of the answer of a codefendant. *North River Savings Bk. v. Buckley*, 130 N. Y. Supp. 787.

**1067 n. 45.** *Baruch v. Young*, 149 App. Div. 466, 134 N. Y. Supp. 53; *Gordon v. Moore*, 59 Misc. 151, 110 N. Y. Supp. 374; *Benjamin v. White*, 55 Misc. 530, 105 N. Y. Supp. 991; *McGarahan v. Sheridan*, 106 App. Div. 532, 94 N. Y. Supp. 708; *Pope Mfg. Co. v. Rubber Goods Mfg. Co.*, 100 App. Div. 349, 91 N. Y. Supp. 828; *Ring v. Mitchell*, 45 Misc. 493, 92 N. Y. Supp. 749; *Palmer v. Day*, 44 Misc. 579, 90 N. Y. Supp. 133; *Dinkelspiel v. New York Evening Journal Pub. Co.*, 91 App. Div. 96, 98, 86 N. Y. Supp. 375.

**1067 n. 49.** But see *Miller v. Florida East Coast Ry. Co.*, 69 Misc. 73, 125 N. Y. Supp. 1015.

**1067 n. 52.** *Young v. White*, 158 App. Div. 760, 143 N. Y. Supp. 931; *Stewart v. F. W. Woolworth Co.*, 154 App. Div. 956, 139 N. Y. Supp. 1146; *Cleminshaw v. Coon*, 136 App. Div. 160, 120 N. Y. Supp. 181; *De Ajuria v. Berwind*, 127 App. Div. 528, 111 N. Y. Supp. 1029; *Chittenden v. San Domingo Imp. Co.*, 125 App. Div. 855, 110 N. Y. Supp. 148; *Bankers' Surety Co. v. Rothschild*, 111 App. Div. 130, 96 N. Y. Supp. 1113; *Parsons v. McDonald*, 88 App. Div. 552, 85 N. Y. Supp. 190; *Ring v. Mitchell*, 45 Misc. 493, 92 N. Y. Supp. 749. However, in *Vogt v. Vogt*, 86 App. Div. 437, 83 N. Y. Supp. 677; *Tradesman's Nat. Bank v. United States Trust Co.*, 49 App. Div. 362, 63 N. Y. Supp. 526; and *Rockwell v. Day*, 84 App. Div. 437, 82 N. Y. Supp. 993, the striking out of allegations of evidence was refused on the ground that the moving party was not prejudiced thereby. It seems that all statements of evidence need not

be stricken out as redundant, especially in equitable actions. *Bell v. Clarke*, 45 Misc. 275, 92 N. Y. Supp. 411. The rule is limited to allegations of evidence in a complaint. *Hamilton v. Hamilton*, 124 App. Div. 619, 109 N. Y. Supp. 221.

**1068.** Denials included in separate defenses should not be stricken out as irrelevant where necessary to the defense. *Mendelson v. Margulies*, 157 App. Div. 666, 142 N. Y. Supp. 825.

**1068 n. 58.** *City Real Estate Co. v. King*, 122 App. Div. 556, 107 N. Y. Supp. 535.

**1068 n. 62.** *Day v. Day*, 95 App. Div. 122, 88 N. Y. Supp. 504.

**1068 n. 64.** Rule 22 of the General Rules of Practice requiring motions to strike out irrelevant matter to be noticed before answering does not apply so as to preclude such a motion after filing a reply to a counterclaim, the reply being necessary. *Sheridan v. Tucker*, 138 App. Div. 436, 122 N. Y. Supp. 800.

**1069.** The right to strike out other matter is waived by a motion to strike out particular matter. *Garrabrant v. Disbrow*, 155 App. Div. 456, 140 N. Y. Supp. 242. Motion to strike out certain matter as irrelevant and scandalous, where granted, precludes a subsequent like attack on other matters retained in the amended pleading. *Garrabrant v. Disbrow*, 155 App. Div. 456, 140 N. Y. Supp. 242. Failure to give notice of motion to strike out matter in the complaint as irrelevant may be waived. *Landmesser v. Hayward*, 157 App. Div. 74, 141 N. Y. Supp. 730. Matter giving rise to different causes of action should be stricken out, in a libel suit, or be compelled to be separately stated and numbered. *Burkan v. Musical Courier Co.*, 141 App. Div. 202, 125 N. Y. Supp. 1059 [rev. 69 Misc. 211, 126 N. Y. Supp. 544]. It is proper to deny motion to strike immaterial matter from an answer where there are identical answers

filed by other defendants. *Barber v. General Asphalt Co.*, 125 App. Div. 412, 109 N. Y. Supp. 1023. Where a part, but not all, of an answer was scandalous, irrelevant, etc., it cannot be stricken from the files, nor can defendant be required to surrender the original answer to plaintiff for cancellation, or to serve an amended pleading, but the scandalous, etc., matter should be stricken out. *Persch v. Weideman*, 106 App. Div. 553, 94 N. Y. Supp. 800.

**1069 n. 69.** The motion must be heard upon the pleadings alone. *Noval v. Haug*, 48 Misc. 198, 96 N. Y. Supp. 706.

**1069 n. 73.** *Bradley v. Sweeny*, 120 App. Div. 315, 105 N. Y. Supp. 296.

**1070 § 923.** Must be clearly frivolous. *People v. Harrison Street Cold Storage Co.*, 138 App. Div. 124, 122 N. Y. Supp. 1002. A pleading will not be "stricken out" as frivolous. *Johnston v. Simpson Crawford Co.*, 115 N. Y. Supp. 141. Judgment cannot be rendered on a supplemental complaint on the ground that a demurrer thereto is frivolous where an answer has been filed to the original complaint after the overruling of a demurrer thereto,—the supplemental complaint not itself stating facts sufficient to constitute a cause of action. *People v. Westchester Traction Co.*, 121 App. Div. 364, 106 N. Y. Supp. 389.

**1070 n. 77.** *Anderson v. McNeely*, 120 App. Div. 676, 105 N. Y. Supp. 278. See also post, **1084 § 926**.

**1070 n. 82.** *Merchants' Review Pub. Co. v. Buchan's Soaps Corporation*, 107 N. Y. Supp. 726; *Zimmerman v. Meyrowitz*, 77 App. Div. 329, 79 N. Y. Supp. 159.

**1071.** A defense is not frivolous merely because argumentative or inartificially stated. *Krebs v. Carpenter*, 124 App. Div. 755, 109 N. Y. Supp. 482. Denial of allegation that plaintiff is owner and holder of note sued on is not frivolous. *Nye v. Power*, 123 N. Y. Supp. 937.

**1071 n. 84.** *Soper v. St. Regis Paper Co.*, 76 App. Div.

409, 78 N. Y. Supp. 782. Answer denying execution of contract, in action for breach of contract, is not frivolous. *Sam v. Mohawk Clothing Co.*, 161 App. Div. 539, 146 N. Y. Supp. 567.

1071 n. 86. An answer denying allegations of performance of conditions precedent is not frivolous. *Hudson Co.'s v. Briemer*, 113 N. Y. Supp. 997.

1071 n. 90. See *Stone v. Auerbach*, 133 App. Div. 75, 117 N. Y. Supp. 734.

1071 n. 92. *Maccarone v. Hayes*, 85 App. Div. 41, 82 N. Y. Supp. 1005.

1072 n. 97. But see *Preston v. Cuneo*, 140 App. Div. 144, 124 N. Y. Supp. 1031; *Stone v. Auerbach*, 133 App. Div. 75, 117 N. Y. Supp. 734. But judgment may be rendered on the pleadings where such a denial is frivolous. *Rochkind v. Perlman*, 123 App. Div. 808, 108 N. Y. Supp. 224. An answer is frivolous where it denies knowledge or information sufficient to form a belief as to the truth of allegations which relate to matters of public record, open by law to public inspection and with knowledge of which the defendant is chargeable by law. *New York v. Matthews*, 180 N. Y. 41, 47 [followed in *Borough Const. Co. v. New York*, 115 N. Y. Supp. 697]. Denial of knowledge as to matters of public record is frivolous. *Allen v. National Surety Co.*, 144 App. Div. 509, 129 N. Y. Supp. 228.

1072 n. 98. Where a denial of knowledge or information sufficient to form a belief is presumptively, but not conclusively, within the knowledge of the pleader, the proper practice is to move for judgment on the answer as frivolous, in which case affidavits may be interposed to show good faith, rather than a motion under § 547 of the Code. *Cerlian v. Bacon*, 155 App. Div. 118, 140 N. Y. Supp. 47.

1072 n. 100. *Smith v. Smith*, 121 N. Y. Supp. 1085.

1072 n. 101. Practice should not be followed, since the amendment of 1908 (Code, § 547) providing a summary



method of testing the pleadings. *Posner v. Rosenberg*, No. 2, 149 App. Div. 272, 133 N. Y. Supp. 704.

**1072** n. 103. *People v. McClellan*, 53 Misc. 469, 102 N. Y. Supp. 946.

**1073** n. 106. *Steel v. Gray*, 117 N. Y. Supp. 936; *Hildreth v. Mercantile Trust Co.*, 112 App. Div. 916, 98 N. Y. Supp. 582; *Shaw v. Feltman*, 99 App. Div. 514, 91 N. Y. Supp. 114; *Rankin v. Bush*, 93 App. Div. 181, 184, 87 N. Y. Supp. 539. See also post, **1084** § 926.

**1073** n. 107. *Compare MacMahon v. Simon*, 128 App. Div. 921, 112 N. Y. Supp. 1110.

**1073** n. 108. "It is true that section 537 does not in terms prescribe that it shall be stated in the notice of motion that it is based upon the frivolousness of the pleading attacked, but it is proper that it should so state in order that the party against whom the motion is made may be duly informed just what defect in his pleading he is called upon to meet. The motion in the present case did not so state, and since it asked for judgment on 'the pleadings,' and not for judgment on 'the answer,' the reasonable inference was that it was made under section 547." *Cerlian v. Bacon*, 155 App. Div. 118, 140 N. Y. Supp. 47.

**1073** n. 113. *Soper v. St. Regis Paper Co.*, 76 App. Div. 409, 412, 78 N. Y. Supp. 782; *Place v. Bleyl*, 45 App. Div. 17, 60 N. Y. Supp. 800.

**1074**. Motion under § 537 of the Code which applies hereto is to be distinguished from motion under § 547 of the Code (post, **1084** § 926). Since the enactment of § 547 in 1908, a motion for judgment on an answer as frivolous will ordinarily be denied without prejudice to a motion under § 547. *Weil v. Harburger*, 67 Misc. 227, 124 N. Y. Supp. 473. Portion of answer cannot be stricken out as frivolous. *Harding v. Steich*, 157 App. Div. 931, 142 N. Y. Supp. 1121. Proper to specify in notice of motion the defect in the pleading. *Cerlian v. Bacon*, 155 App. Div. 118, 140 N. Y. Supp. 47.

**1074 n. 117.** A summary judgment should not be given on an answer, unless the answer as a whole is frivolous, since, if one of the defenses is good, the whole answer is clearly not frivolous. *Wilcox v. Home Life Ins. Co.*, 117 N. Y. Supp. 937.

**1074 n. 120.** *Northern Bank v. Becker*, 65 Misc. 579, 120 N. Y. Supp. 880.

**1075 n. 124.** Where defendant sets up no defense in its answer, files no affidavit of merits, and does not show that in fact it has any defense, the order for judgment on the pleadings should not be conditioned on failure to serve an amended answer within a fixed time. *McDonnell v. Winthrop Realty Co.*, 132 App. Div. 912, 117 N. Y. Supp. 92.

**1075 n. 126.** When a demurrer is overruled as frivolous, the demurrant as a defendant should not be permitted to answer of course, but only upon a showing to the reasonable satisfaction of the court that the demurrer was interposed in good faith and that he has a valid defense. *McNeil v. Board of Supervisors of Suffolk County*, 131 App. Div. 126, 115 N. Y. Supp. 215.

**1075 n. 127.** *Barwin Realty Co. v. Union Stove Works*, 146 App. Div. 319, 130 N. Y. Supp. 781.

**1076.** Denial not sham because at variance with defendant's books. *Mudgett v. Grand Trunk Ry.*, 65 Misc. 304, 119 N. Y. Supp. 843. A hypothetical plea may be stricken as sham, but where there is a good denial the whole answer cannot be stricken. *Duke v. Grant*, 126 App. Div. 383, 110 N. Y. Supp. 563 [citing *Nichols' New York Pr.* 845].

**1076 n. 141.** *Schlesinger v. Wise*, 106 App. Div. 587, 94 N. Y. Supp. 718.

**1077 n. 146.** *Gibbs v. Title Guaranty & S. Co.*, 79 Misc. 247, 139 N. Y. Supp. 945. A specific denial cannot be stricken out as sham even where inconsistent with a separate defense set up in the answer. *Schlesinger v. Wise*,

106 App. Div. 587, 94 N. Y. Supp. 718; *Schlesinger v. McDonald*, 106 App. Div. 570, 94 N. Y. Supp. 721.

**1077** n. 147. *Rockowitz v. Siegel*, 151 App. Div. 636, 136 N. Y. Supp. 192; *Schlesinger v. McDonald*, 106 App. Div. 570, 94 N. Y. Supp. 721; *Hopkins v. Meyer*, 76 App. Div. 365, 78 N. Y. Supp. 459.

**1077** n. 148. *Rochkind v. Perlman*, 123 App. Div. 808, 108 N. Y. Supp. 224; *Schlesinger v. McDonald*, 106 App. Div. 570, 94 N. Y. Supp. 721. At least where personal knowledge is not necessarily to be inferred. *Curtis-Blaisdell Co. v. Lederer*, 82 Misc. 444, 143 N. Y. Supp. 1074. Denial not sham as to matters of public record if some of the matters thereby put in issue are not matters of record. *Low v. Buttner*, 151 App. Div. 705, 136 N. Y. Supp. 208.

**1077** n. 151. The falsity must appear beyond a reasonable doubt. *Zimmerman v. Meyrowitz*, 77 App. Div. 329, 79 N. Y. Supp. 159. It is not enough that a material fact contained in the original answer which was held bad on demurrer was omitted from the amended answer. *Id.*

**1078** n. 152. *Shape v. Shape*, 77 Misc. 649, 137 N. Y. Supp. 605. Unless defendant's affidavits show it to be sham. *Atkiengesellschaft Arnold B. Heine Co. v. Newmark*, 65 Misc. 51, 119 N. Y. Supp. 191.

**1079** n. 163. *Carleton v. Lawrence*, 77 Misc. 573, 137 N. Y. Supp. 200.

**1081** § 925. 1908 amendment authorizing judgment on the pleadings before trial, see post, **1084** § 926. Matters of fact alleged in an answer are not to be regarded as admitted by the complaint for the purpose of a motion to dismiss such complaint. *Bannister v. Michigan Mut. Life Ins. Co.*, 111 App. Div. 765, 97 N. Y. Supp. 843. A dismissal at the opening of the case upon the grounds that the complaint fails to state any cause of action is not justified if the complaint states any cause of action either at law or in equity. At most, if timely made, it would only

justify an order sending the cause to the Special Term calendar. *Doty v. Norton*, 133 App. Div. 106, 117 N. Y. Supp. 793. A plea of the statute of limitations is no ground for dismissal of the complaint at the opening of the trial. *Church v. Stevens*, 56 Misc. 572, 107 N. Y. Supp. 310. If a complaint for injuries, in an action by a servant against his master, states a cause of action either at common law or under the statute, it is error to dismiss it. *Finley v. Conlan*, 152 App. Div. 202, 136 N. Y. Supp. 565.

1083 n. 196. *Abbott v. Easton*, 195 N. Y. 372, 88 N. E. 572 [reversing on other grounds 122 App. Div. 274, 106 N. Y. Supp. 970]; *De Wolf v. Ford*, 193 N. Y. 397, 86 N. E. 527 [reversing on other grounds 104 N. Y. Supp. 876]; *Staiger v. Klitz*, 129 App. Div. 703, 114 N. Y. Supp. 486. See also *Landesman v. Hauser*, 50 Misc. 300, 98 N. Y. Supp. 663 (holding that averments in answer cannot be considered). Plaintiff is entitled to a fair and liberal interpretation of the complaint. *Mix v. Charles P. Boland Co.*, 153 App. Div. 435, 138 N. Y. Supp. 361. Motion is equivalent to a demurrer for insufficiency. *Chism v. Smith*, 210 N. Y. 198, 104 N. E. 131. Motion to dismiss should not be granted unless no cause of action is stated, admitting all the allegations of the complaint to be true. *Wood Mfg. Co. v. Johnstone*, 148 App. Div. 747, 133 N. Y. Supp. 422. On motion to dismiss the complaint on opening of counsel, all facts well pleaded therein are to be taken as true. *Gilmour Door Co. v. Shea*, 150 App. Div. 239, 134 N. Y. Supp. 919. On a motion to dismiss on the opening, complaint must be taken as true, and answer cannot be considered. *Spallholz v. Sheldon*, 148 App. Div. 573, 132 N. Y. Supp. 560. Complaint must be taken as true, without accepting answer as true, on motion for nonsuit made on the pleadings at the opening of the trial. *Wanamaker v. Butler Mfg. Co.*, 136 App. Div. 265, 120 N. Y. Supp. 1000. Complaint should not be dismissed at opening of trial where the answer

is a general denial. *Candel v. Bankler*, 140 N. Y. Supp. 373.

1083 n. 199. *Babcock v. Anson*, 122 App. Div. 73, 106 N. Y. Supp. 642.

1083 n. 201. See *Kappes v. New York City R. Co.*, 50 Misc. 534, 99 N. Y. Supp. 322.

1084 § 926. Enlarging the scope of this section so as to cover motions for judgment on the pleadings not only at the trial but also before trial, it becomes sufficiently broad to house the decisions under § 547 of the Code, added as a new section by Laws 1908, c. 166, which provides that "If either party is entitled to judgment upon the pleadings, the court may upon motion at any time after issue give judgment accordingly." *Abramowitz v. Abramowitz*, 113 N. Y. Supp. 798. See *Leibowitz v. J. B. Thomson Real Estate Co.*, 158 App. Div. 592, 143 N. Y. Supp. 802. This new and important Code provision furnishes a remedy which has been used to such an extent that it has largely superseded motions for judgment on the ground that a pleading is frivolous under § 537 of the Code (see ante, 1070 § 923) and is often used instead of a demurrer. "The advantage of this summary method of determining the law of the case without the delay and expense of preparing the case for trial, and even perhaps actually trying it, only to ascertain that the complaint is insufficient in law, is clearly pointed out by Mr. Justice Giegerich in *Mitchell v. Dunmore Realty Co.*, 60 Misc. Rep. 563, 112 N. Y. Supp. 659. \* \* \* The rules governing the determination of the motion are the same as where the motion is made at the trial." *Longenecker v. Longenecker Bros.*, 140 N. Y. Supp. 403, 405. The purpose of the statute is to permit of a judgment disposing of the action on the same grounds and governed by the same rules, as though the motion had been made at trial. *Mitchell v. Dunmore Realty Co.*, 135 App. Div. 583, 585; *Cunningham v. Platt*, 82 Misc. 486, 144 N. Y. Supp. 51.

“Section 547 of the Code, as enacted in 1908, is specific authority for the practice which, without such authority, the Court of Appeals sanctioned in 1870. The section, in its present form, is remedial in its nature, and I think should be given a liberal construction. It was designed to prevent the delay incident to the trial of an issue of law raised by a demurrer, or a motion upon the pleadings at the trial. This section authorizes the court to award ‘judgment upon the pleadings,’ and the ‘judgment’ referred to in this section may be either an interlocutory or final judgment. \* \* \* In providing that when a party ‘is entitled to judgment’ the court may ‘give judgment accordingly,’ section 547 obviously contemplates that the court shall award such a judgment as either party is entitled to, under the pleadings, whether the judgment be interlocutory or final.” *White v. Gibson*, 61 Misc. 436, 113 N. Y. Supp. 983. On a motion based on the statute of 1908, the same rule must be applied that would be had the motion been made at the trial. Where the defendant makes such motion, it cannot be granted if the facts stated show that the plaintiff is entitled to any relief, either legal or equitable, even though the judgment demanded is not the precise relief to which he appears to be entitled. *Clark v. Levy*, 130 App. Div. 389, 114 N. Y. Supp. 890. Rule that pleading will not be stricken as frivolous if it requires argument to demonstrate the fact does not apply where the motion is based on § 547 of the Code. *Delmar v. Kinderhook Knitting Co.*, 134 App. Div. 558, 119 N. Y. Supp. 705. “It is clearly proper, for instance, to grant judgment upon the pleadings when the only denials in an answer are denials of knowledge or information sufficient to form a belief with respect to matters which are unmistakably within the knowledge of the defendant who interposes such an answer. In such a case it is of no practicable importance whether there is a motion before trial to strike out the answer as sham, or frivolous; or whether a motion is made at the

trial for judgment on the pleadings, because the result in either case will be the same." *Kirschbaum v. Eschmann*, 205 N. Y. 127, 133, 98 N. E. 328. But inasmuch as a denial of knowledge or information sufficient to form a belief as to matters of public record is only presumptively false or frivolous, and extraneous evidence is not permissible on this motion, it is not a proper remedy in such a case. *Harley v. Plant*, 210 N. Y. 405, 104 N. E. 946. Motion is proper where it appears that the Supreme Court will not act because relief can be had in a Surrogate's Court. *Childs v. Childs*, 68 Misc. 472, 124 N. Y. Supp. 550. If reply is good in part, defendant cannot have judgment on the pleadings. *Smith v. Metropolitan L. Ins. Co.*, 79 Misc. 550, 140 N. Y. Supp. 327. Issues of fact raised by the pleadings cannot be determined on a motion for judgment on the pleadings. *Theobald v. United States Rubber Co.*, 83 Misc. 627, 142 N. Y. Supp. 187. Thus judgment on the pleadings should not be granted where the amount of plaintiff's damages is put in issue. *Lewis v. City Realty Co.*, 158 App. Div. 733, 143 N. Y. Supp. 1026. So if material allegations of the complaint are put in issue, plaintiff is not entitled to judgment on the pleadings. *Stevenson v. Devins*, 158 App. Div. 616, 143 N. Y. Supp. 916; *Lewis v. City Realty Co.*, 158 App. Div. 733, 143 N. Y. Supp. 1026 (allegation as to damages); *Cunningham v. Platt*, 82 Misc. 486, 144 N. Y. Supp. 51 (although facts pleaded as defense are not sufficient either as a defense or as a counterclaim); *Neal v. New York City Police Endowment Fund*, 82 Misc. 408, 143 N. Y. Supp. 1093; *Gibbs v. Title Guaranty Sec. Co.*, 79 Misc. 247, 139 N. Y. Supp. 945; *Marine Contractors Supply Co. v. Paltrowitz*, 139 N. Y. Supp. 43. "Of course, if the pleadings present any issue as to a material question of fact, that issue cannot be disposed of upon such a motion, but every such motion necessarily involves the decision of an issue of law." *Nat. Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846, 847.

Defendant may move under this section on ground that complaint does not state facts sufficient to constitute a cause of action. *Hoey v. Kilduff*, 65 Misc. 554, 120 N. Y. Supp. 971; *O'Rourke v. Patterson*, 157 App. Div. 284, 142 N. Y. Supp. 195. But if complaint sets up a good cause of action, judgment should not be granted against plaintiff because of his being precluded from giving evidence on account of failure to file a further bill of particulars. *Witschleben v. Glynn*, 156 App. Div. 193, 140 N. Y. Supp. 1037. So clerical mistakes in a complaint, which could not have misled, are not ground. *Casey v. Auburn Tel. Co.*, 131 N. Y. Supp. 1. And defendant's motion should be denied where complaint states facts entitling him to the relief prayed for, and there is no counterclaim. *Carney v. Pendleton*, 139 App. Div. 152, 123 N. Y. Supp. 738. If motion is by plaintiff, only the sufficiency of the answer need be considered. *Stratton v. Graham*, 140 N. Y. Supp. 869. Where counterclaim is interposed, failure of answer to deny cause of action is not ground. *Stratton v. Graham*, 140 N. Y. Supp. 869. If there is a counterclaim and a reply untried, judgment on the pleadings cannot be granted plaintiff. *Simon v. Bierbauer*, 154 App. Div. 506, 139 N. Y. Supp. 327. Motion under § 547 of the Code will not be granted, to dismiss counterclaim, since it would not dispose of all the issues in the action. *Sayre v. Progressive Construction & Leasing Co.*, 159 App. Div. 799, 144 N. Y. Supp. 897. "Mr. Justice Bischoff held that, after a defendant had joined issue by denial of the averments of the complaint, he could not move under this section upon the ground that the complaint is insufficient in substance (*Ship v. Fridenberg*, 65 Misc. Rep. 308, 120 N. Y. Supp. 969), but this decision was reversed by the Appellate Division (136 App. Div. 931, 120 N. Y. Supp. 1146), on the authority of their former decision in the same case reported in 132 App. Div. 782, 117 N. Y. Supp. 599, *supra*." *Longenecker v. Longenecker*, 140 N. Y.



Supp. 403, 405. Demurrer may be disposed of by motion under § 547 of the Code. *National Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846; *Dueringer v. Klocke*, 78 Misc. 417, 139 N. Y. Supp. 676. Demurrer to complaint may be tried by. *Realty Associates v. Hoage*, 141 App. Div. 799, 126 N. Y. Supp. 709; *Nat. Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846 [aff. 203 N. Y. 556]. But see *Ventriniglia v. Eichner*, 138 App. Div. 274, 122 N. Y. Supp. 966. Issues of law raised by demurrer to the complaint may be passed on on a motion by plaintiff for judgment on the pleadings. *Schwartz v. Williams*, 153 App. Div. 302, 137 N. Y. Supp. 1048. May move for judgment on the pleadings under § 547 although a material question of law is presented by the pleadings. *National Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846. Pleading attacked will be deemed to allege whatever may be implied from its statements by fair and reasonable intendment. *McCarthy v. Heiseman*, 140 App. Div. 240, 125 N. Y. Supp. 13. Where defendant moves, he admits all the material allegations of the complaint. *Felt v. Germania Life Ins. Co.*, 149 App. Div. 14, 133 N. Y. Supp. 519; *McCarthy v. Fitzgerald*, 139 N. Y. Supp. 950. A motion for judgment on the pleadings is improperly granted, on the basis of facts alleged in the answer as a defense, since the effect of such allegations is a matter of proof and not of pleading, the answer being deemed controverted. *Rose v. White Plains*, 146 App. Div. 170, 131 N. Y. Supp. 334. Motion under § 547 is not governed by the same rules as a motion under § 537 on the ground that the pleading is frivolous, but is to be treated as though made at the trial, and governed by the same rules as would then be applicable thereto. *Olsen v. Singer Mfg. Co.*, 143 App. Div. 142, 127 N. Y. Supp. 697, 2 Civ. Pro. (N. S.) 242. Under this amendment, motion may be made at any time after issue joined. *Mitchell v. Dunmore Realty Co.*, 60 Misc. 563,

112 N. Y. Supp. 659. Sufficiency of complaint may be tested under § 547 even after an answer has been interposed. *Schleissner v. Goldsticker*, 135 App. Div. 435, 120 N. Y. Supp. 333. Defendant may move after answer, on the complaint and answer. *Longenecker v. Longenecker Bros.*, 140 N. Y. Supp. 403. But motion cannot be made until the cause is at issue. *Childs v. Childs*, No. 1, 144 App. Div. 167, 128 N. Y. Supp. 781. Where a denial of knowledge or information sufficient to form a belief is used to meet allegations only "presumptively" within the knowledge of the person making the denial, or where the defect is such that the court may permit an amendment, motion for judgment on the pleadings "at the trial" will not be granted, since the motion should be made before trial when affidavits may be presented to show good faith. *Kirschbaum v. Eschmann*, 205 N. Y. 127, 98 N. E. 328 [rev. 142 App. Div. 906]. Such a motion must be determined solely on the pleadings as they existed at the time of the motion, and they cannot in any way be aided by affidavits or testimony. *Ship v. Fridenberg*, 132 App. Div. 782, 117 N. Y. Supp. 599; *Standard Fashion Co. v. Thompson*, 137 App. Div. 588, 122 N. Y. Supp. 300; *Emanuel v. Walter*, 138 App. Div. 818, 123 N. Y. Supp. 491. To sustain a judgment on the pleadings, the court cannot go outside the pleadings. *Hawes v. Hawes*, 128 N. Y. Supp. 50. Affidavits cannot be interposed on either side. *Partenfelder v. People*, 157 App. Div. 462, 142 N. Y. Supp. 915; *Longenecker v. Longenecker Bros.*, 140 N. Y. Supp. 403. Bill of particulars may be considered. *Dineen v. May*, 149 App. Div. 469, 134 N. Y. Supp. 7; *Wood v. Miller*, 78 Misc. 377, 138 N. Y. Supp. 562; *Seltzer v. Stein*, 140 N. Y. Supp. 92. Bill of particulars cannot be considered in order to limit the effect of the allegations of the complaint. *Hoey v. Killduff*, 65 Misc. 554, 120 N. Y. Supp. 971. Order denying a motion for judgment on the pleadings on the ground that the action is barred by limita-

tions should be refused where it appears only from the summons, and the summons was not before the court nor the motion based thereon. *Pernisi v. Schmalz' Sons*, 142 App. Div. 53, 126 N. Y. Supp. 880. Where plaintiff moves under § 547, defendant who has demurred cannot obtain judgment on his demurrer at the hearing of the motion unless he has made a cross-motion for judgment. *Zeikus v. Florida East Coast Ry. Co.*, 70 Misc. 339, 128 N. Y. Supp. 931 [aff. in 144 App. Div. 91]. Want of capacity to sue is not considered on motion for judgment on the pleadings because of failure of complaint to state cause of action. *Van Tuyl v. New York Real Estate Secur. Co.*, 153 App. Div. 409, 138 N. Y. Supp. 541 [aff. in 207 N. Y. 691, 101 N. E. 1096]. It seems that the order cannot merely dismiss a counterclaim. *Cunningham v. Platt*, 82 Misc. 486, 144 N. Y. Supp. 51. Where an issue at law raised by demurrer is tried on a motion for judgment on the pleadings under section 547, there need be but one paper entered, which shall contain both a statement of the decision and the pronouncement of judgment, and which shall take the place both of the decision and of the interlocutory judgment under the former practice. "Prior to the recent amendment of section 976, Code Civ. Proc. (Laws 1909, c. 493), under which the hearing of a demurrer may now be brought on in this department as a contested motion, there were apparently two methods by which a demurrer could be brought on for a hearing when it went to the whole cause of action or the whole defense. One was by a motion for judgment under section 547, and the other was by the old process of noticing the issue for trial at Special Term, awaiting its turn on the calendar, and, after it had been determined, entering first what is called a 'decision,' and then what is called an 'interlocutory judgment.' Naturally most practitioners chose the simpler, quicker, and less expensive method of disposing of the issue. Now, the amendment of section

976 has opened the way to finally and completely avoid the useless formalities which formerly obtained in disposing of a demurrer. Of course, there must be a decision, which is nothing more than saying that the justice must decide the question presented to him, and that decision must be put in definite form, and the consequent judgment of the court pronounced. But there is no reason why the record of the decision and the pronouncement of the judgment should be contained in two papers rather than one, and it can make no possible difference to anyone whether the paper which records the decision and pronounces judgment is labeled an 'order' or a 'decision' or an 'interlocutory judgment.' The same result will be obtained, the same quality of justice administered, and the same effect produced upon the litigation, if the decision of the question of law and the pronouncement of the appropriate judgment are embraced in the same paper, and it is labeled an 'order,' as would be obtained, administered, and produced if two papers are drawn where one will serve the purpose, by whatever names those papers may be called. The recent enactment of section 547 and the more recent amendment of section 976 seems to me to have been inspired by a desire on the part of the Legislature to do something towards making our practice simpler and more expeditious, and I do not conceive that it is the duty of this court to thwart that intention by insisting upon the observance of antiquated and useless formalities which serve only to prolong litigation and increase the cost to litigants." *Nat. Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846, 847. "The point of the objection to the procedure is that an issue of law raised by demurrer to the complaint must be brought on for argument on a notice of trial and a decision and interlocutory judgment entered thereon, and that in such a case the summary remedy provided by section 547 is inapplicable. That section has been held in this department to have been intended to permit either party

to make in advance of the trial a motion for judgment on the pleadings which, under the practice which formerly prevailed, could be made only at the trial. (Clark v. Levy, 130 App. Div. 389.) It has not been held, however, and I can see no logical reason for holding, that such a motion cannot be granted if a material issue of law is raised by the pleadings. Of course, if the pleadings present any issue as to a material question of fact, that issue cannot be disposed of upon such a motion, but every such motion necessarily involves the decision of an issue of law." Nat. Park Bank v. Billings, 144 App. Div. 536, 537, 129 N. Y. Supp. 846 [aff. 203 N. Y. 556]. Where the complaint is demurred to for failure to state a cause of action and thereafter defendant moves for judgment on the pleadings, the proper order, on overruling the demurrer, instead of an interlocutory judgment, is an order that the plaintiff have judgment overruling said demurrer, without costs, but with leave to the defendant within twenty days after service of a copy of said judgment to withdraw said demurrer and answer the complaint, and that in case of a failure of the defendant to serve an answer within that time plaintiff have final judgment against said defendant for the relief demanded in the complaint, and for that purpose that the plaintiff's damages be assessed by a jury, and that a writ of inquiry issue to the sheriff of a specified county for that purpose. Shiffner v. Beck, 159 App. Div. 821, 145 N. Y. Supp. 1145. Where a motion by plaintiff for judgment on the pleadings is granted with leave to defendant to submit affidavits of a meritorious defense, the refusal to allow service of answers is proper where the affidavits do not go to the merits and the answer is verified on information and belief. Teague v. Ridgway Co., 145 App. Div. 277, 130 N. Y. Supp. 84. "Whether an issue of law arising upon the pleadings is brought on under section 547 or section 976, the order should contain the appropriate provisions to work substantial justice which have heretofore

been contained in an interlocutory decree on demurrer, such as extending leave to amend or plead over upon proper terms." *Nat. Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846, 848. Order may permit plaintiff to plead over. *McCarthy v. Fitzgerald*, 139 N. Y. Supp. 950. Where plaintiff moves for judgment on the pleadings, under Code, § 547, defendant should be allowed to amend if he shows a meritorious defense. *Framingham Trust Co. v. Villard*, 74 Misc. 204, 133 N. Y. Supp. 823. Leave to amend should be granted where it appears that existing facts may be alleged so as to cure the defect in the pleading. *Ellenborger v. Slocum*, 123 N. Y. Supp. 342. In order to determine whether the right to plead anew shall be granted, affidavits should be required. *Caffadona v. Illinois Surety Co.*, 123 N. Y. Supp. 341. It is improper, on overruling the motion, to provide that it may be renewed after searching the pleading by an application for particulars or plaintiff's conscience by examination. *Ship v. Fridenberg*, 132 App. Div. 782, 117 N. Y. Supp. 599. Either the order made on the motion for judgment on the pleadings under section 547 of the Code, or the judgment entered on the order, or both, may be appealed from. *Mitchell v. Dunmore Realty Co.*, 135 App. Div. 583, 120 N. Y. Supp. 771. An interlocutory judgment for an accounting may be entered on a motion under § 547 of the Code for judgment on the pleadings. *Furmans v. Gough*, 70 Misc. 337, 128 N. Y. Supp. 722. Judgment is one on the merits. *Ship v. Fridenberg*, 65 Misc. 308, 120 N. Y. Supp. 969.

1084 nn. 204, 205. *Myers v. Stein*, 154 App. Div. 631, 139 N. Y. Supp. 762.

1084 n. 206. Under the practice before 1908, a motion for judgment on the pleadings could not be made before the opening of the trial. *Durham v. Durham*, 99 App. Div. 450, 91 N. Y. Supp. 295.

1084 § 927. See also post, 2297 n. 695. Where plaintiff  
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elected at the trial to proceed against executors as such rather than as individuals, the election cannot be withdrawn at the close of the testimony. *Adelman v. Fennell*, 74 Misc. 96, 131 N. Y. Supp. 648. Election should not be compelled between a common-law cause of action and one under the Employers' Liability Act. *Chernick v. Independent, etc., Co.*, 147 App. Div. 767, 132 N. Y. Supp. 104. See also post, 1087 § 930.

**1085.** Not required to elect between quantum meruit and special contract. *Byrne v. Gillies Co.*, 144 App. Div. 677, 129 N. Y. Supp. 602.

**1085 n. 212.** Causes of action for an accounting under a contract and for its cancellation are not inconsistent. *Gowans v. Jobbins*, 90 App. Div. 429, 86 N. Y. Supp. 312.

**1085 n. 216.** *Leslie v. Firemen's Ins. Co.*, 60 Misc. 558, 112 N. Y. Supp. 496. See *Mendelson v. Bronner*, 124 App. Div. 396, 108 N. Y. Supp. 807; *Mutual Life Ins. Co. v. Grannis*, 118 App. Div. 830, 103 N. Y. Supp. 835; *Franke v. N. W. Taussig Co.*, 48 Misc. 169, 95 N. Y. Supp. 212. In the absence of injury to the defendant, where the proof will be practically the same in support of both causes of action, the Special Term will deny a motion before trial to compel an election, without prejudice, it seems, to a motion at the trial. *Monigan v. Erie R. Co.*, 99 App. Div. 603, 91 N. Y. Supp. 657. Where the complaint contains two counts for the same services, one under special contract and one on quantum meruit, plaintiff should not be compelled to elect, there being but one cause of action. *Rubin v. Cohen*, 129 App. Div. 395, 113 N. Y. Supp. 843. Where there are several distinct grounds upon which the plaintiff may recover on but a single cause of action, it is proper to allege under different counts each ground of liability, and the plaintiff cannot be compelled to take the hazard of an election. *Shirley v. Bernheim*, 123 App. Div. 428, 107 N. Y. Supp.

946; *Logan v. Whitley*, 129 App. Div. 666, 114 N. Y. Supp. 255.

**1085**, first sentence after note 216. *Walar v. Rechnitz*, 126 App. Div. 424, 110 N. Y. Supp. 777 [quoting from 1 *Nichols' New York Pr.* 1085].

**1086** n. 226. The motion may be granted at the close of the testimony though properly denied before. *Rosenberg v. Heidelberg*, 98 App. Div. 17, 90 N. Y. Supp. 684.

**1087** n. 229. *Gordon v. Moore*, 59 Misc. 151, 110 N. Y. Supp. 374 [citing *Nichols' New York Pr.*, § 928].

**1087** § 929. Inconsistent defenses is ground. *Kraus & Co. v. Mayer*, 150 App. Div. 122, 134 N. Y. Supp. 694.

**1087** § 930. May compel separate statement of causes of action. *Huguley v. Gardner*, 157 App. Div. 720, 142 N. Y. Supp. 660. Separate torts cannot be joined in one count, where involving separate, distinct and independent wrongs. *Ellery v. People's Bank of City of New York*, 139 App. Div. 928, 124 N. Y. Supp. 410. Complaint held to state but one cause of action. *New York v. New York Evening Post Co.*, 155 App. Div. 530, 140 N. Y. Supp. 761. The order is complied with where plaintiff serves an amended complaint setting up only one cause of action. *O'Reilly v. Skelly*, 117 App. Div. 559, 102 N. Y. Supp. 884. Where plaintiff has a single cause of action for negligence, but sets out separate negligent acts, some constituting negligence at common law and others under the Employers' Liability Act, he cannot be compelled to amend by striking out the allegations involved in a common-law action or in the alternative to separately state his common-law action and his statutory action. *Acardo v. N. Y. Cont. & T. Co.*, 116 App. Div. 793, 102 N. Y. Supp. 7. In an action to recover penalties for unlawful sale of milk, an order will not be granted to compel separate allegations as to each can of milk sold at one sale.



**People v. Liberman Dairy Co.**, 59 Misc. 22, 109 N. Y. Supp. 1067.

**1087 n. 233.** See **Christenson v. Pincus**, 133 App. Div. 52, 117 App. Div. 810; **Crosby v. Cowen & Co.**, 141 App. Div. 369, 126 N. Y. Supp. 204. Motion is proper. **Lyon v. Friedlander**, 116 N. Y. Supp. 569. Motion should be granted where two causes of action stated. **Garrison v. Sun Printing, etc., Co.**, 144 App. Div. 428, 129 N. Y. Supp. 448.

**1088.** Where the complaint discloses the theory of the action, and plaintiff concedes that he relies upon but one cause of action, the motion to separately state and number will be denied. **Ring v. Mitchell**, 45 Misc. 493, 92 N. Y. Supp. 749. Complaint held to set forth two or more causes of action. **Wood v. New York Interurban Water Co.**, 157 App. Div. 407, 142 N. Y. Supp. 626; **Kenny v. Phyfe**, 139 N. Y. Supp. 324.

**1088 n. 237.** **Benedict v. Thain**, 150 App. Div. 137, 134 N. Y. Supp. 720.

**1088 n. 238.** **Huguley v. Gardner**, 157 App. Div. 720, 142 N. Y. Supp. 660; **Ring v. Mitchell**, 45 Misc. 493, 92 N. Y. Supp. 749. See **Carr v. Kimball**, 130 App. Div. 107, 114 N. Y. Supp. 300. But see **Astoria Silk Works v. Plymouth Rubber Co.**, 126 App. Div. 18, 110 N. Y. Supp. 175.

**1088 n. 239.** See also **Kaulbach v. Knickerbocker Trust Co.**, 139 App. Div. 566, 124 N. Y. Supp. 286.

**1088 n. 240.** **Baruch v. Young**, 149 App. Div. 466, 134 N. Y. Supp. 53; **Weed v. First Nat. Bank**, 106 App. Div. 285, 94 N. Y. Supp. 681; **Smith v. Irvin**, 45 Misc. 262, 92 N. Y. Supp. 170; **Woods v. McClure**, 42 Misc. 8, 85 N. Y. Supp. 549. See **Payne v. New York, Susquehanna, etc., R. Co.**, 201 N. Y. 436, 95 N. E. 19. If elaborate argument is necessary to show that more than one cause of action is stated, the motion will not be granted. **People v. Buell**, 85 App. Div. 141, 83 N. Y. Supp. 143.

**1088** n. 243. *Stern v. Marcuse*, 119 App. Div. 478, 103 N. Y. Supp. 1026.

**1089** n. 244. But it seems that inasmuch as inconsistent averments in the reply cannot be used to help out the plaintiff's cause of action, no prejudice can result from a refusal to strike out such averments. *Pope Mfg. Co. v. Rubber Goods Mfg. Co.*, 100 App. Div. 349, 91 N. Y. Supp. 828.

## CHAPTER IX

### WAIVER OF OBJECTIONS

**1090.** Failure to urge a misnomer before appearance and answer is a waiver. *McNeal v. Hayes Mach. Co.*, 118 App. Div. 130, 103 N. Y. Supp. 312. That plaintiff is not the real party in interest is waived by failure to plead it. *Calvert v. Thurston*, 58 Misc. 347, 109 N. Y. Supp. 567.

**1090** n. 1. *Dickinson v. Tysen*, 125 App. Div. 735, 110 N. Y. Supp. 269.

**1090** n. 2. *Wood & Selick v. Ball*, 114 App. Div. 743, 100 N. Y. Supp. 119. Failure to state cause of action is not waived by failure to demur. *Thrall v. Cuba Village*, 88 App. Div. 410, 84 N. Y. Supp. 661. The fact that the complaint shows on its face that the oral contract relied on is invalid within the statute of frauds does not prevent the objection being taken by answer instead of by demurrer since the objection really is that no cause of action is stated and that objection is not waived by a failure to demur. *Seamans v. Barentsen*, 180 N. Y. 333, 73 N. E. 42 [reversing 78 App. Div. 36, 79 N. Y. Supp. 212]. Failure to state a cause of action is waived, however, so far as to permit an appellate court to amend the complaint to conform to the evidence so as to sustain the judgment, where a motion to dismiss the complaint because thereof is denied at the opening of the case, with leave to renew,

and the motion to dismiss made at the close of plaintiff's case and of all evidence did not refer to the insufficiency of the complaint nor was any of the evidence objected to as inadmissible under the complaint. *Johnson v. City of Albany*, 86 App. Div. 567, 571, 83 N. Y. Supp. 1002. The withdrawal of a demurrer does not estop the defendant from objecting on the trial that the complaint does not state a cause of action. *Seydel v. Corporation Liquidating Co.*, 92 N. Y. Supp. 225. Objection to jurisdiction of court is not waived. *Le Brantz v. Campbell*, 89 App. Div. 583, 85 N. Y. Supp. 654.

1090 n. 3. *Meyers v. Amer. Locomotive Co.*, 201 N. Y. 163, 94 N. E. 605; *Gordon v. Moore*, 59 Misc. 151, 110 N. Y. Supp. 374.

1090 n. 4. *Van Tuyl v. New York Real Estate Secur. Co.*, 153 App. Div. 409, 138 N. Y. Supp. 541 [aff. in 207 N. Y. 691, 101 N. E. 1096]; *Morton v. St. Patrick's Roman Catholic Church Society*, 56 Misc. 71, 105 N. Y. Supp. 1100; *Waters v. Spencer*, 44 Misc. 15, 89 N. Y. Supp. 693. The existence of a cause of action should be distinguished from the capacity to sue. *Town of Ulysses v. Ingersoll*, 81 App. Div. 304, 80 N. Y. Supp. 924.

1091. See also ante, 925 n. 55. The objection that separate causes of action are not separately stated and numbered is waived unless presented before trial of the action. *Gearity v. Strasbourger*, 133 App. Div. 701, 118 N. Y. Supp. 257.

1091 n. 6. *Jones v. Gould*, 200 N. Y. 18, 92 N. E. 1071; *Seligman v. Friedlander*, 199 N. Y. 373 [aff. 138 App. Div. 784]; *Alaska Banking, etc., Co. v. Van Wyck*, 146 App. Div. 5, 130 N. Y. Supp. 563; *Strobel & Wilken Co. v. Wiesen*, 144 App. Div. 149, 128 N. Y. Supp. 798; *White v. Miller*, 78 Misc. 428, 139 N. Y. Supp. 660; *Peckham v. Wentworth*, 116 N. Y. Supp. 781; *Semon v. Daggett*, 62 Misc. 55, 114 N. Y. Supp. 763; *Bauman v. Kuhn*, 57 Misc. 618, 108 N. Y.

Supp. 773; *Wills v. Pennell*, 116 App. Div. 493, 101 N. Y. Supp. 1017; *Fawcett v. New York*, 112 App. Div. 155, 98 N. Y. Supp. 286; *Ward v. Smith*, 95 App. Div. 432, 434, 88 N. Y. Supp. 700. Exception to rule, as laid down in note followed in *Jewett v. Schmidt*, 45 Misc. 34, 90 N. Y. Supp. 848; *Kent v. Aetna Ins. Co.*, 84 App. Div. 428, 82 N. Y. Supp. 817. If the objection, apparent on the face of the complaint, is not taken by demurrer, it is improper for the court, on the hearing of a demurrer to the answer, to grant the defendant leave to demur to the complaint because of a defect of parties. *Ward v. Smith*, 95 App. Div. 432, 88 N. Y. Supp. 700. Defect of parties plaintiff can be urged only by demurrer where it appears on face of complaint. *Rosenbloom v. Maryland Casualty Co.*, 153 App. Div. 23, 137 N. Y. Supp. 1064. Nonjoinder of defendants is waived by not urging it by demurrer or answer. *Jones v. Gould*, 200 N. Y. 18, 92 N. E. 1071. That rule is otherwise in an equity action, see *City Equity Co. v. Elm Park Realty Co.*, 135 App. Div. 856, 120 N. Y. Supp. 437. Point so waived cannot be urged by a motion for judgment on the pleadings. *Wallace v. Bouvier*, 141 App. Div. 525, 126 N. Y. Supp. 440.

1091 n. 7. *Chandler v. Rutland R. R. Co.*, 140 App. Div. 68, 124 N. Y. Supp. 1046; *Jacobs v. New York Cent. & H. R. R. Co.*, 107 App. Div. 134, 94 N. Y. Supp. 954.

1091 n. 8. *Ward v. Smith*, 95 App. Div. 432, 88 N. Y. Supp. 700; *Shaw v. New York*, 83 App. Div. 212, 216, 82 N. Y. Supp. 44. If appears on face of complaint, objection cannot be taken by answer. *Berg v. Bates*, 153 App. Div. 12, 137 N. Y. Supp. 1032. Misjoinder of causes of action is waived if not taken by demurrer, where defect appears on the face of the complaint. *Berg v. Bates*, 153 App. Div. 12, 137 N. Y. Supp. 1032.

1092 § 935. Denials as to "other material allegations," while improper, where no motion to make more definite and certain is made, should not be disregarded and defendant's

evidence excluded. *Swing v. Engle*, 143 App. Div. 181, 127 N. Y. Supp. 322. Objection that answer is negative pregnant cannot first be urged on appeal. *Cochran v. Whitney*, 65 Misc. 565, 120 N. Y. Supp. 724.

**1092 n. 13.** *Contra.* Defense and counterclaim may be stricken at opening of trial. *Bowsky v. Schlichten*, 132 N. Y. Supp. 421. "If the defense was insufficient in law, it was proper, when it had not been demurred to, to object to it at that time and to move for its dismissal. The advantage in such practice is that the ground to be covered by the evidence upon the trial is, seasonably, restricted." *Amper-sand Hotel Co. v. Home Ins. Co.*, 198 N. Y. 495, 497. Affirmative defense may be dismissed at the trial. *Laing v. Hudgens*, 82 Misc. 388, 143 N. Y. Supp. 763.

**1092 n. 15.** *Thomas v. Noonan*, 130 App. Div. 895, 118 N. Y. Supp. 25. The allegations of the counterclaim are thereby admitted but not whether the counterclaim was a proper one. *Van v. Madden*, 132 App. Div. 535, 116 N. Y. Supp. 1115.

**1093 § 938.** Where a pleading is returned on one ground, other grounds are waived. *Tolhurst v. Howard*, 94 App. Div. 439, 88 N. Y. Supp. 235. Retention of an answer precludes the plaintiff from treating it as a nullity because of the failure to serve with an order for the trial of the issues, in an action against a corporation. *Tautphoeus v. Harbor & S. Bldg. & Sav. Ass'n*, 96 App. Div. 23, 26, 88 N. Y. Supp. 709.

**1093 n. 22.** *Story v. Richardson*, 91 App. Div. 381, 86 N. Y. Supp. 843.

## PART V

### PROVISIONAL REMEDIES BEFORE TRIAL

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#### CHAPTER I

##### PROVISIONAL REMEDIES CONSIDERED GENERALLY

No New Matter Has Been Found for This Chapter

#### CHAPTER II

##### ARREST AND BAIL

**1275** n. 38. *Washington Life Ins. Co. v. Scott*, 57 Misc. 492, 110 N. Y. Supp. 49.

**1276** n. 1. See post, **2149** § 1649.

**1284** n. 101. Sufficiency of complaint for conversion as basis for arrest, see *Ibled v. Koehler*, 134 App. Div. 496, 119 N. Y. Supp. 241. General manager of life insurance company, where personally served, may be arrested for violation of trust; and the right to arrest is not waived by the acceptance of checks for certain of the moneys collected. *Washington Life Ins. Co. v. Scott*, 57 Misc. 492, 110 N. Y. Supp. 49.

**1289** n. 134. Word "liability," as used herein, means liability flowing from a breach of the contract on which the action is based and is not a liability for deceit in inducing the contract. *Novotny v. Kosloff*, 159 App. Div. 478, 144 N. Y. Supp. 652.

**1289 n. 139.** A mere constructive fraud, such as a sale by a debtor of his entire stock of merchandise in bulk without the notice to his creditors required by Laws 1902, c. 528, does not warrant an arrest. *Mann v. Chrestopulos*, 87 App. Div. 222, 84 N. Y. Supp. 372.

**1293.** Immaterial that property disposed of was not located in this state where the indebtedness arose here between residents. *Polo v. D'Achille*, 157 App. Div. 294, 142 N. Y. Supp. 506.

**1297 n. 190.** Code provision now Cons. Laws, c. 6, § 23.

**1297 n. 191.** See *General Explosive Co. v. Hough*, 63 Misc. 377, 116 N. Y. Supp. 1114.

**1302 n. 215.** *Manhattan Commercial Co. v. Leuchtenberg Co.*, 77 Misc. 565, 138 N. Y. Supp. 168 [citing *Nichols' Pr.*].

**1308 n. 265.** Code provision is now Cons. Laws, c. 6, § 24.

**1309 n. 279.** Code provision is now Cons. Laws, c. 6, § 25.

**1310.** Attendance on a bankruptcy proceeding is such attendance as gives exemption. *Goldsmith v. Haskell*, 120 App. Div. 403, 105 N. Y. Supp. 327.

**1310 n. 281.** Has reasonable time to return; delay to consult with attorney held not unreasonable. *Goldsmith v. Haskell*, 120 App. Div. 403, 105 N. Y. Supp. 327.

**1310 nn. 285, 286.** Code provisions now Cons. Laws, c. 6, §§ 25, 26.

**1313 n. 303.** This Code provision is now Cons. Laws, c. 6, § 22.

**1315 n. 313.** See, as contra, *Lewis v. Pollack*, 85 App. Div. 577, 83 N. Y. Supp. 287.

**1316 § 996.** Is insufficient where it designates defendant by a fictitious name where plaintiff knows his true name. *Dadirrian v. Whitson*, 54 Misc. 54, 105 N. Y. Supp. 458.

**1317** n. 328. *Diad v. Shibley*, 49 Misc. 315, 99 N. Y. Supp. 188.

**1318** n. 332. Followed in *Barnes v. Goss*, 98 App. Div. 1, 90 N. Y. Supp. 140.

**1318** n. 333. The fact that the verification of the complaint is defective is not fatal where the existence of a cause of action, within section 549 of the Code, appears by an independent affidavit. *Voorhees Rubber Mfg. Co. v. McEwen*, 111 App. Div. 541, 97 N. Y. Supp. 942.

**1318** n. 334. Affidavit must show right of action, and positive affidavits of persons having knowledge of the facts must be produced or excuse shown. *Lewis v. Lewis*, 77 Misc. 412, 136 N. Y. Supp. 686.

**1319** n. 338. *Cole v. Core*, 121 App. Div. 632, 106 N. Y. Supp. 306.

**1319** n. 340. Complaint has no probative value as an affidavit where its allegations are positively stated but appear from verification to be in fact based on writings the contents of which are not stated. *Penn Oil & Supply Co. v. Cohn*, 131 App. Div. 929, 116 N. Y. Supp. 124.

**1319** n. 342. *Alber v. Harris*, 126 App. Div. 504, 110 N. Y. Supp. 645; *Lewis v. Lewis*, 77 Misc. 412, 136 N. Y. Supp. 686.

**1320** n. 343. May be supplied nunc pro tunc on motion to vacate order. *Manhattan Commercial Co. v. Leuchtenberg Co.*, 77 Misc. 565, 138 N. Y. Supp. 168.

**1320** n. 344. Moving papers purporting to be based on personal knowledge, and which fail to show personal knowledge, and which state no circumstances from which the inference can fairly be drawn that an affiant has personal knowledge of the facts which he alleges, are insufficient. *Price v. Levy*, 93 App. Div. 274, 87 N. Y. Supp. 740. Affidavit held insufficient, see *Wilson v. Collins*, 119 App. Div. 88, 103 N. Y. Supp. 1038.

**1321.** Must state facts on which alleged cause of action



arises. *Dadirrian v. Whitson*, 54 Misc. 54, 105 N. Y. Supp. 458.

**1321** n. 356. *Barnes v. Goss*, 98 App. Div. 1, 90 N. Y. Supp. 140.

**1324** n. 368. Where the arrest is sought under subdivision 4, i. e., where the action is based on contract with allegations of fraud, it is submitted that the complaint must be one of the moving papers, though the contrary is held in *Lewis v. Pollack*, 85 App. Div. 577, 83 N. Y. Supp. 287.

**1324** n. 369. *Polo v. D'Achille*, 157 App. Div. 294, 142 N. Y. Supp. 506. Such allegations cannot change a cause of action on contract to one based on a tort. *Taylor v. Klein*, 130 App. Div. 615, 115 N. Y. Supp. 445.

**1325** n. 372. Allegation that defendant "embezzled" held sufficient. *Spiegel v. Levine*, 161 App. Div. 764, 147 N. Y. Supp. 78.

**1325** n. 377. See *Mussiller v. Rice*, 116 N. Y. Supp. 1028.

**1329** n. 404. *McLean v. Fidelity & Deposit Co. of Maryland*, 56 Misc. 623, 107 N. Y. Supp. 907. But counsel fees for defending the cause of action are not recoverable. *Feinstein v. Jacobs*, 139 App. Div. 192, 123 N. Y. Supp. 750.

**1330**. Costs and expenses of the trial are not recoverable. *Kattell v. American Surety Co.*, 160 App. Div. 68, 145 N. Y. Supp. 465. Rights of assignee of undertaking, and necessity that rights of all be fixed in one action to which all the claimants are made parties, see *McLean v. Fidelity & Deposit Co. of Maryland*, 56 Misc. 623, 107 N. Y. Supp. 907.

**1332** § 1001. Sufficiency of showing in order that plaintiff had given undertaking, see *Mussiller v. Rice*, 116 N. Y. Supp. 1028.

**1335** n. 443. An order stating the grounds of arrest as "defamation of character of plaintiff" is sufficient as stating slander. *Juskovitz v. Rafsky*, 130 N. Y. Supp. 839. Suf-

ficiency of statement, see *Mussiller v. Rice*, 116 N. Y. Supp. 1028.

**1342 n. 499.** *Dadirrian v. Whitson*, 54 Misc. 54, 105 N. Y. Supp. 458.

**1344 § 1019.** New affidavits cannot be read in opposition where the motion is based on the original papers. *Maniscalco v. Slamowitz*, 123 App. Div. 690, 108 N. Y. Supp. 65.

**1345 § 1020.** The affidavits used on the motion to obtain the arrest, as well as the complaint, will be considered. *Kavanaugh v. McIntyre*, 128 App. Div. 722, 112 N. Y. Supp. 987.

**1347 § 1021.** If affidavit is precisely the same as the complaint, the order should be vacated if the complaint is demurrable for misjoinder of causes of action. *Vock v. Auterbourn*, 66 Misc. 222, 122 N. Y. Supp. 1023.

**1347 n. 539.** Sufficiency of complaint, see *Spiegel v. Levine*, 161 App. Div. 764, 147 N. Y. Supp. 78. Sufficiency of complaint in action for carnal assault, see *Cholodnicka v. Gloniczek*, 150 App. Div. 206, 134 N. Y. Supp. 650.

**1348 n. 542.** *Reinboth v. Ederheimer*, 134 N. Y. Supp. 16.

**1348 n. 546.** But if affidavits make a prima facie case of actionable fraud, order will not be vacated. *Rath v. McNaught*, 158 App. Div. 906, 143 N. Y. Supp. 1140.

**1348 n. 549.** *Marks v. Goetchius*, 60 Misc. 143, 112 N. Y. Supp. 1009.

**1349 n. 553.** *Marks v. Goetchius*, 60 Misc. 143, 112 N. Y. Supp. 1009.

**1350 n. 556.** The clause "from an arrest made in violation of section twenty-six of the civil rights law" is added by Laws 1909, c. 65.

**1351 n. 561.** The delay referred to herein means more than a mere neglect to proceed. It means a positive act in the way of obstruction. The failure to serve a notice of trial or file a note of issue is not such delay since defendant's

attorney could do such acts and bring the case to trial as well as plaintiff's attorney. *Goff v. Charlier*, 44 Misc. 28, 89 N. Y. Supp. 722.

**1356** n. 592. Liability, see *Bond v. National Surety Co.*, 79 Misc. 563, 141 N. Y. Supp. 217.

**1361** § 1039. When cash is deposited with the sheriff in lieu of bail, and subsequently an undertaking is given, the affirmative duty is imposed upon the sheriff of serving notice of justification without waiting for exception, and until such notice is given and said sureties do justify, and the judge before whom the justification is had so directs, the sheriff is not authorized to return such deposit, and if he does so, so that the money may not be applied to the payment of the judgment, if one is recovered in the action, he is guilty of an unlawful official act, to plaintiff's damage. (Code Civ. Proc., § 585.) *Tiffany v. Harvey*, 158 App. Div. 159, 143 N. Y. Supp. 31.

**1362** n. 630. No excuse that proper officers did not wish to receive deposit. *Tiffany v. Harvey*, 158 App. Div. 159, 143 N. Y. Supp. 31.

**1364** n. 655. *Colton v. Sullivan*, 56 Misc. 61, 106 N. Y. Supp. 939.

**1365** n. 664. If not surrendered within such time, the party arrested is discharged, and the bail are liable. *Bond v. Bond*, 140 N. Y. Supp. 40. A mere offer "to give him up" is insufficient. *Garofalo v. Prividi*, 43 Misc. 359, 87 N. Y. Supp. 467. In an action against a sheriff for a false return to a body execution, he may plead as a partial defense in mitigation of damages that the plaintiff and a surety were in the sheriff's office after the commencement of the action against the sureties and before the time to answer in said action had expired; that the said sureties were then and there advised of the manner in which they could relieve themselves from further liability; and that, notwithstanding such information and advice, they wholly neglected to surrender their

principal to the defendant as required by law. *Prividi v. O'Brien*, 46 Misc. 56, 91 N. Y. Supp. 324.

**1372** n. 714. *Garofalo v. Prividi*, 43 Misc. 359, 87 N. Y. Supp. 467.

**1373** n. 730. A recovery in excess of the amount of the undertaking may be modified on appeal. *Garofalo v. Prividi*, 43 Misc. 359, 87 N. Y. Supp. 467.

**1374** § 1046. Application on judgment, see *Elite Distributing Co. v. Schrul*, 69 Misc. 206, 126 N. Y. Supp. 607.

**1374** n. 739. See also ante, **1361** § 1039.

**1375** n. 741. *Tiffany v. Harvey*, 158 App. Div. 159, 143 N. Y. Supp. 31.

**1375** n. 744. *Contra*, *Allen v. O'Bryan*, 58 Misc. 32, 108 N. Y. Supp. 838 (holding that, in any event, the rule laid down in the earlier case can avail only in actions at law).

**1376** nn. 749, 750. Sections 145 to 148 of the Code are now Cons. Laws, c. 43, §§ 357-360.

**1377** n. 751. Applies to arrest under judgment for violation of game law. *People v. Monaco*, 54 Misc. 25, 105 N. Y. Supp. 401.

## CHAPTER III

### ATTACHMENT

**1382** § 1056. Where the affidavits are insufficient, and the summons is not personally served in attachment cases, the court has no right to enter a judgment by default. *H. Mohlman Co. v. Landwehr*, 87 App. Div. 83, 83 N. Y. Supp. 1073; *Leavitt v. Matzkin*, 114 N. Y. Supp. 687.

**1383** n. 11. In an action on contract, an attachment may be issued although the action is by a nonresident against a nonresident. *Bridges v. Wade*, 110 App. Div. 106, 97 N. Y. Supp. 156.

**1384** n. 18. In City Court of New York, an attachment

cannot be issued against a domestic corporation. *Granieri v. New York Shoe Repairing Co.*, 56 Misc. 121, 106 N. Y. Supp. 1107.

**1385 § 1062.** If nonresident defendant dies before he is served by publication, the attachment lien is not extinguished and service upon a foreign administrator against whom the action is continued, within the thirty days, is sufficient. *Logan v. Greenwich Trust Co.*, 144 App. Div. 372, 129 N. Y. Supp. 577. Service by publication completed under a former attachment which had been vacated is sufficient to sustain a second attachment in the same action. *Gallagher v. Appley*, 68 Misc. 524, 124 N. Y. Supp. 837.

**1386 n. 29.** Time to serve summons cannot be extended so as to give jurisdiction. *Jones v. Fuchs*, 106 App. Div. 260, 94 N. Y. Supp. 57.

**1388 § 1063.** That defendant had previously obtained an attachment on ground of defendant's nonresidence does not preclude an attachment on the ground of intent to defraud creditors. *Bilder v. Ellis*, 66 Misc. 539, 123 N. Y. Supp. 1081.

**1388 n. 51.** *Gallagher v. Appley*, 68 Misc. 524, 124 N. Y. Supp. 837.

**1389 n. 57.** Not proper where other relief is sought before there can be a money judgment. *Avery v. Avery*, 119 App. Div. 698, 104 N. Y. Supp. 290. In commenting upon the rule stated in the text, Justice Spencer, in *Avery v. Avery*, 52 Misc. 297, 102 N. Y. Supp. 955, says: "It is true that it has been said by respectable authority that it is now well established that an attachment will not issue in an action wherein an equitable remedy is sought. 2 Nichols' Pr. 1389. But I think the statement too sweeping and the decisions upon which it rests not binding upon this court."

**1390 n. 60.** See also *Avery v. Avery*, 52 Misc. 297, 102 N. Y. Supp. 955.

**1390 n. 63.** *Dudley v. Armenia Ins. Co.*, 115 App. Div. 380, 100 N. Y. Supp. 818.

**1392** n. 79. Action held not one for conversion. *Dudley v. Armenia Ins. Co.*, 115 App. Div. 380, 100 N. Y. Supp. 818.

**1394** n. 90. See *Tocci v. Gianvecchio*, 48 Misc. 351, 95 N. Y. Supp. 583.

**1394** n. 94. This case is affirmed in 173 N. Y. 314; *McBride v. Illinois Nat. Bank*, 128 App. Div. 503, 112 N. Y. Supp. 794.

**1394** § 1070. Leaving former domicile with intention of abandoning it, and coming to reside in New York with the intention of acquiring a domicile here, although the first place of residence here is a temporary one, makes one a resident. *Aetna Nat. Bank v. Kramer*, 142 App. Div. 444, 126 N. Y. Supp. 970.

**1395** n. 97. *Irwin v. Raymond*, 58 Misc. 319, 110 N. Y. Supp. 1100.

**1395** n. 101. *Irwin v. Raymond*, 58 Misc. 319, 110 N. Y. Supp. 1100.

**1399**. The mere fact that a solvent domestic corporation is about to remove its manufacturing plant to New Jersey is not, of itself, ground. *Davis v. Reflex Camera Co.*, 97 App. Div. 73, 89 N. Y. Supp. 587.

**1399** n. 130. Mere resistance of payment of claim is not enough. *Technical Press v. Silverman*, 142 App. Div. 423, 126 N. Y. Supp. 833.

**1407** n. 185. In an action against a firm, the fact that a warrant of attachment was obtained against two of the three defendants sued was no objection to a levy on the property of the firm, where the two defendants against whom the warrant was obtained had been served and appeared. *Rogers v. Ingersoll*, 103 App. Div. 490, 93 N. Y. Supp. 140.

**1408** n. 190. See *McFadden v. Innes*, 60 Misc. 543, 112 N. Y. Supp. 912. Cause of action on contract. *Milliken v. Fidelity & Deposit Co.*, 129 App. Div. 206, 113 N. Y. Supp. 809. Section 648 of the Code is amended by Laws 1907, c. 318, by adding the following: "The attachment

may also be levied upon a right or interest, present or future, to any of the property or estate of a deceased person which may belong to the defendant and which could be legally assigned by him as legatee or distributee, whether the same exists by reason of the provisions of a last will and testament admitted to probate at the time the attachment is granted, or by operation of the law in case of the intestacy of the deceased. Levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the rights and interests of the defendant at the time of such levy, subject to the rights of the executor, administrator or trustee of such estate to administer the same according to law."

**1409** n. 199. *Herrmann & Grace v. New York*, 130 App. Div. 531, 114 N. Y. Supp. 1107.

**1410** n. 204. See also *Bridges v. Wade*, 113 App. Div. 350, 99 N. Y. Supp. 126. Furthermore a firm debt to a foreign corporation cannot be attached by service of copies of the attachment on a partner residing in this state, in so far as the liability of nonresident partners is concerned. *National Broadway Bank v. Sampson*, 179 N. Y. 213, 71 N. E. 766. Situs of debt, see *Flynn v. White*, 122 App. Div. 780, 107 N. Y. Supp. 860.

**1411** n. 214. *Lowenthal v. Hodge*, 120 App. Div. 304, 105 N. Y. Supp. 120.

**1412** n. 216. This Code provision was amended in 1911 (c. 419) so as to include rights "in a bond negotiable or otherwise."

**1413** n. 227. See also *Gittings v. Russel*, 49 Misc. 432, 99 N. Y. Supp. 853.

**1415** § 1087. Fees of juror are exempt. *Brown v. Edinger*, 61 Misc. 366, 114 N. Y. Supp. 1116.

**1416.** Laws 1909, c. 65, adds as Code section 1404a a provision exempting from attachment or any kind of seizure property en route to or from, or on exhibition at, any in-

ternational exhibition held under the supervision of the United States.

**1418** n. 262. "The word 'necessary,' as used in this provision, qualifies the extent of the exemption. It is not all the meat, groceries, and vegetables provided for family use, but so much as a prudent man would ordinarily keep on hand for family use." *McCarthy v. McCabe*, 131 App. Div. 396, 115 N. Y. Supp. 829.

**1419** n. 272. Candelabrum, desk, and safe of undertaker are not exempt as part of his professional instruments and furniture. Aliter as to candelabrum necessarily used at funerals which are exempt as working tools. *O'Reilly v. Erlanger*, 108 App. Div. 318, 95 N. Y. Supp. 760. Furniture, etc., used in express business held exempt. *Galowitz v. Bumford*, 54 Misc. 41, 104 N. Y. Supp. 492.

**1423** n. 308. *Matter of Stafford*, 105 App. Div. 46, 94 N. Y. Supp. 194.

**1424** n. 314. *Smith v. Blood*, 106 App. Div. 317, 94 N. Y. Supp. 667.

**1429** n. 344. And see *Moss v. Lightfine*, 60 Misc. 62, 111 N. Y. Supp. 675.

**1430** n. 347. This Code provision does not prevent one from estopping himself to claim property as exempt, as by becoming a surety on a bond and enumerating in the affidavit of justification the exempt property as property not exempt, he having knowledge of the exemption which was not known to those with whom he was dealing. *McMahon v. Cook*, 107 App. Div. 150, 94 N. Y. Supp. 1019. See also *Emerson v. Knapp*, 114 N. Y. Supp. 794.

**1433.** All that the law requires is that the information furnished by the moving papers shall be such that a person of reasonable prudence would be willing to accept and act upon it. *Brandly v. American Butter Co.*, 130 App. Div. 410; *Bendure v. Bidwell*, 82 Misc. 33, 143 N. Y. Supp. 97.

**1434** n. 375. See *Lewis v. Tindel-Morris Co.*, 109 App.



Div. 509, 96 N. Y. Supp. 576 (where the sources were held to be sufficiently stated). Rule applies to allegations as to cause of action in the complaint, where the complaint is used as an affidavit. *Slater v. American Palace Car Co.*, 146 App. Div. 859, 131 N. Y. Supp. 17.

**1436.** Sources of belief as to nonresidence are sufficiently shown by reciting that the affidavit is made on statements by the debtor personally, together with the correspondence and the fact that the judgment sued on was recovered in another state. *Coakley v. Rickard*, 136 App. Div. 489, 121 N. Y. Supp. 280.

**1436 n. 391.** Where the affidavit is based on telephone conversations with the nonresident plaintiff, and the communication confirmed by a subsequent letter from the plaintiff, the letter must be produced. *Grumbes v. Hicks*, 116 App. Div. 120, 101 N. Y. Supp. 741 [affirmed without opinion in 190 N. Y. 532].

**1437 n. 397.** *Calmon Asbestos, etc., Works v. Asbest-Und-Gummuverke*, 141 App. Div. 198, 126 N. Y. Supp. 120; *American Trading Co. v. Bedouin Steam Nav. Co.*, 48 Misc. 624, 96 N. Y. Supp. 271. See also *Beckermann v. Chambers*, 47 Misc. 289, 95 N. Y. Supp. 914; *Wilson v. Puritan S. S. Co.*, 58 Misc. 317, 110 N. Y. Supp. 914. Compare *McMahon v. Roseville Trust Co.*, 159 App. Div. 640, 144 N. Y. Supp. 841.

**1438.** Positive allegation that defendant is a foreign corporation is insufficient where source of knowledge is not given nor facts stated indicating the averment was made upon personal knowledge. *Dain's Sons Co. v. McNally Co.*, 137 App. Div. 857, 122 N. Y. Supp. 964 [aff. 65 Misc. 161, 119 N. Y. Supp. 625]. Stating source of information as conversations with defendant, without giving the conversations, is insufficient. *Cousins v. Schlichter*, 135 App. Div. 779, 119 N. Y. Supp. 899. It is not sufficient that the persons making the depositions assert some matters, without giving

their source of information or showing that they are in fact possessed of the facts from personal knowledge, which might give rise to a suspicion that the defendant intended to dispose of some portion of his property with fraudulent intent, since the rule is well settled that where it is apparent that the affiant had no actual knowledge or information of the facts, definite statements as to such facts are insufficient. *Kelderhouse v. McGarry*, 82 Misc. 365, 143 N. Y. Supp. 741.

1438 n. 398. But see *Kelderhouse v. McGarry*, 82 Misc. 365, 143 N. Y. Supp. 741.

1439. Allegation of nonresidence, where made by a principal in the transaction and not by his assignee is presumed to be made on knowledge. *Geduld v. Baltimore & O. R. R. Co.*, 70 Misc. 495, 127 N. Y. Supp. 317.

1439 n. 408. *Pettit v. United States Motor Co.*, 77 Misc. 277, 136 N. Y. Supp. 260.

1440 § 1102. In action on account stated, it is sufficient to allege nonpayment without presenting proof thereof. *Bremer v. Ring*, 146 App. Div. 724, 131 N. Y. Supp. 487. If verified complaint taking the place of an affidavit states no cause of action and no facts on which to base an estimate of damages, the attachment should not be granted. *Wolfsohn v. Lanzit*, 141 App. Div. 420, 125 N. Y. Supp. 1096. A failure to state, or a mistake in reciting, the nature of the cause of action is immaterial; and if plaintiff states facts sufficient to constitute any of the causes of action specified in the Code, it is sufficient. *Murphy v. Lindstedt*, 142 App. Div. 777, 127 N. Y. Supp. 609. Failure to expressly allege that the money is due, in an action on a judgment, is not fatal. *Coakley v. Rickard*, 136 App. Div. 489, 121 N. Y. Supp. 280. In City Court of New York, see *Fine v. Lyons*, 141 N. Y. Supp. 294.

1440 n. 411. *Jonasson v. Herrick*, 126 App. Div. 827, 111 N. Y. Supp. 69; *Outerbridge v. Campbell*, 87 App. Div. 597, 84 N. Y. Supp. 537. See *Cutietta v. Cilluffo*, 127

N. Y. Supp. 297. In City Court of New York, see *Fine v. Lyons*, 141 N. Y. Supp. 294.

1440 n. 414. Mere conclusions of fact, appropriate for a pleading, are not enough. *Calmon Asbestos, etc., Works v. Asbest-Und-Gummuverke*, 141 App. Div. 198, 126 N. Y. Supp. 120.

1440 n. 416. *Hilborn v. Pennsylvania Cement Co.*, 145 App. Div. 142, 129 N. Y. Supp. 957; *Mexico City Banking Co. v. McIntyre*, 105 App. Div. 492, 94 N. Y. Supp. 157. Failure to give is ground for vacating attachment. *Engels Exp. Co. v. Ferguson*, 79 Misc. 40, 138 N. Y. Supp. 1086.

1441 n. 426. *Brandly v. American Butter Co.*, 130 App. Div. 410, 114 N. Y. Supp. 896.

1442 n. 431. See *Bremer v. Ring*, 146 App. Div. 724, 131 N. Y. Supp. 487.

1442 n. 432. Facts must be stated from which the court can judicially determine the amount due. Conclusions are insufficient. *Frusher v. Vacuum Dyeing Machine Co.*, 148 App. Div. 68, 131 N. Y. Supp. 994.

1442 n. 433. *Ingalls Stone Co. v. Nunn*, 136 App. Div. 142, 120 N. Y. Supp. 168. See *C. Fennant Sons & Co. v. New Jersey Oil & Meal Co.*, 78 Misc. 497, 139 N. Y. Supp. 1023; *Box Board & Lining Co. v. Vincennes Paper Co.*, 45 Misc. 1, 90 N. Y. Supp. 836; *Restrepo v. Jaramillio*, 134 N. Y. Supp. 352.

1442 n. 434. *Downing v. Nelson*, 49 Misc. 446, 97 N. Y. Supp. 1005. Rule applied in *Austrian Bentwood Furniture Co. v. Wright*, 43 Misc. 616, 88 N. Y. Supp. 142. See *Netter v. Trenton Whisk Broom Works*, 140 App. Div. 287, 125 N. Y. Supp. 141.

1443 n. 436. *Kahn v. Hollander*, 140 App. Div. 492, 125 N. Y. Supp. 333.

1443 n. 439. *Kelderhouse v. McGarry*, 82 Misc. 365, 143 N. Y. Supp. 741.

1443 n. 445. Affidavit leaving out clause. "over and

above all counterclaims" is fatally defective. *McGinley v. Gildersleeve*, 124 App. Div. 324, 108 N. Y. Supp. 888.

**1444.** Not sufficient to allege as to counterclaims known to "defendant." *Reynolds v. Bean*, 138 N. Y. Supp. 1104.

**1444 n. 448.** *Campbell v. Emslie*, 115 App. Div. 385, 100 N. Y. Supp. 783.

**1445 n. 454.** *Bremer v. Ring*, 146 App. Div. 724, 131 N. Y. Supp. 487.

**1446.** An affidavit on information and belief that defendant has made no designation of a person on whom service of process can be made is sustained by an informal county clerk's certificate as follows: "Nothing found to December 10th, 1903, at 9 a. m." *Ennis v. Untermeyer*, 93 App. Div. 375, 87 N. Y. Supp. 695. Sufficiency of affidavits as to nonresidence, see *Beckermann v. Chambers*, 47 Misc. 289, 95 N. Y. Supp. 914.

**1447.** Declaration of debtor of his intention to become a nonresident, and exhibition of passage tickets, does not of itself show nonresidence. *Bodine v. Bodine*, 79 Misc. 434, 140 N. Y. Supp. 118. Sufficiency of affidavit of attorney, see *Campbell v. Emslie*, 115 App. Div. 385, 100 N. Y. Supp. 783.

**1447 n. 466.** Affidavit held insufficient, see *Irwin v. Raymond*, 58 Misc. 319, 110 N. Y. Supp. 1100.

**1448.** Where the papers do not disclose that the contract was made within the state, it is not necessary to aver compliance with the statutory condition as to a certificate procured from the secretary of state to enable a foreign corporation to sue. *Box Board & Lining Co. v. Vincennes Paper Co.*, 45 Misc. 1, 90 N. Y. Supp. 836.

**1448 n. 470.** The order will not be vacated if the affidavit by fair implication states plaintiff was a resident when the action was begun and that the cause of action arose in the state. *Brandly v. American Butter Co.*, 130 App. Div. 410, 114 N. Y. Supp. 896. An affirmative allegation that defendant is a foreign corporation was held sufficient in *Simons v.*

Lehigh Mills Co., 53 Misc. 368, 104 N. Y. Supp. 739. Personal knowledge of affiant was presumed in *Box Board & Lining Co. v. Vincennes Paper Co.*, 45 Misc. 1, 90 N. Y. Supp. 836. A mere allegation, where inference of personal knowledge cannot be drawn, is insufficient. *American Trading Co. v. Bedouin Steam Nav. Co.*, 48 Misc. 624, 96 N. Y. Supp. 271. See also vol. 2, p. 1437 n. 397.

1449 n. 478. *Lassen v. Burt*, 46 Misc. 582, 92 N. Y. Supp. 796. To same effect. *Bodine v. Bodine*, 79 Misc. 434, 140 N. Y. Supp. 118.

1449 n. 479. See *George v. Miles*, 138 N. Y. Supp. 1089.

1450. Sufficiency of affidavit, see *Wishny v. Gottfried*, 131 N. Y. Supp. 593.

1450 n. 482. Merely showing that defendant is about to sell his personal property is not sufficient. *Kelderhouse v. McGarry*, 82 Misc. 365, 143 N. Y. Supp. 741.

1453 § 1106. Allegations as to amount of damages held amendable by supplemental affidavit. *Kahn v. Hollander*, 140 App. Div. 492, 125 N. Y. Supp. 333.

1453 n. 512. On a motion to vacate, the court has no power to amend the affidavits on which the warrant of attachment was based, to meet the objection that the warrant stated only conclusions and that these were in the alternative. *Davis v. Reflex Camera Co.*, 97 App. Div. 73, 89 N. Y. Supp. 587.

1454 n. 516. Where the court issuing a warrant of attachment has jurisdiction, the sufficiency of the affidavit for the attachment is not questionable on collateral attack. *Rogers v. Ingersoll*, 103 App. Div. 490, 93 N. Y. Supp. 140.

1454 § 1108. A copy of the undertaking need not be served upon defendant. *Mazurette v. Richard Carle Amusement Co.*, 49 Misc. 604, 99 N. Y. Supp. 1109.

1457 § 1116. If attachment was vacated, proof of a second warrant and proceedings thereunder is inadmissible

as a defense or in mitigation of damages. *Geller v. Rosenfield*, 139 App. Div. 289, 123 N. Y. Supp. 628.

**1459.** If defendant is a nonresident, and could not have been brought within the jurisdiction of the court except by attaching his property, he may recover the expenses of the trial, and this is so although he made no motion to vacate the attachment if such a motion would have been futile. *Balinsky v. Gross*, 72 Misc. 7, 128 N. Y. Supp. 1062.

**1459 n. 548a.** *Fixel v. Tallman*, 116 N. Y. Supp. 639.

**1459 n. 551.** *Marks v. Massachusetts Bonding & Ins. Co.*, 117 N. Y. Supp. 1019.

**1460 n. 560.** The attachment must be signed by the plaintiff's attorney. *Lassen v. Burt*, 46 Misc. 582, 92 N. Y. Supp. 796.

**1464.** Where the levy is bad and cannot be cured, and where jurisdiction depends upon a levy having been made, the levy may be set aside. *Bridges v. Wade*, 113 App. Div. 350, 99 N. Y. Supp. 126.

**1464 n. 586.** A defect of this character is not jurisdictional and does not render the attachment void. *Rogers v. Ingersoll*, 103 App. Div. 490, 93 N. Y. Supp. 140.

**1465 n. 589.** The effect of the attachment is merely to create a lien. *Beardslee v. Ingraham*, 106 App. Div. 506, 94 N. Y. Supp. 937.

**1467 n. 608.** Service must be on the pledgee where a foreign corporation. *Lowenthal v. Hodge*, 120 App. Div. 304, 105 N. Y. Supp. 120.

**1468 n. 609.** Subdivision 3 of section 649 of the Code is amended by Laws 1907, c. 318, by adding the clause "or if it consists of a right or interest in an estate of a deceased person arising under the provisions of the will or under the provisions of law in case of intestacy, with the executor or trustee under the will, or the administrator of the estate."

**1469 n. 618.** *Gittings v. Russel*, 114 App. Div. 405, 99 N. Y. Supp. 1064.

**1469** n. 619. *Gittings v. Russel*, 114 App. Div. 405, 99 N. Y. Supp. 1064.

**1469** n. 620. *Gittings v. Russel*, 114 App. Div. 405, 99 N. Y. Supp. 1064.

**1472**. Liability on bond given by third persons claiming property attached, see *Krauss v. Merkle*, 53 Misc. 277, 103 N. Y. Supp. 192.

**1481** n. 697. Rule applied to levy on real property. *Beardslee v. Ingraham*, 106 App. Div. 506, 94 N. Y. Supp. 937.

**1483** § 1133. A complaint which alleges a levy under an attachment and the recovery of a judgment and the issuance of an execution in behalf of the plaintiff against certain property, and the claim on behalf of defendants of a superior lien upon that property, which lien the court is asked to declare void as against the plaintiff, does not show any ground for invoking the aid of equity. *Gavazzi v. Dryfoos*, 110 App. Div. 90, 97 N. Y. Supp. 59 [reversing 47 Misc. 15, 95 N. Y. Supp. 199].

**1483** n. 708. An attachment regularly issued against a "foreign corporation" creates a right superior to the claim of a receiver appointed in the home jurisdiction, even though such receivership is prior in point of time to the levy of the attachment, if it be levied prior to the appointment of a receiver in this state. *National Park Bank v. Clark*, 92 App. Div. 262, 87 N. Y. Supp. 185. Where property of a corporation is placed in the hands of a receiver appointed by a court of this state, and the receiver is ordered to sell and hold the proceeds of the sale subject to incumbrances, it is not proper to enjoin a sale under an attachment issued by a federal court though levied before the receivership proceedings. *Beardslee v. Ingraham*, 183 N. Y. 411, 76 N. E. 476 [reversing on this point 106 App. Div. 506, 94 N. Y. Supp. 937].

**1486** § 1137. Where undertaking is given, plaintiff can

recover the property. *Shaw v. Dunn*, 122 App. Div. 736, 107 N. Y. Supp. 777.

**1487** n. 730. *Shaw v. Dunn*, 122 App. Div. 736, 107 N. Y. Supp. 777.

**1492** n. 748. The sheriff's rights, under this Code section, cannot survive the attachment itself and is dependent thereon, and after such attachment has been discharged by order of the court it no longer exists, and the Code provision can no longer be invoked by the sheriff. *O'Brien v. Manhattan R. Co.*, 45 Misc. 643, 91 N. Y. Supp. 69. When remedy not available, see *Lowenthal v. Hodge*, 120 App. Div. 304, 105 N. Y. Supp. 120.

**1493** § 1142. See *Hart v. A. L. Clarke & Co.*, 194 N. Y. 403, 87 N. E. 808 [affirming 127 App. Div. 679, 111 N. Y. Supp. 886]. In an action in aid of an attachment, to set aside an alleged fraudulent transfer, a temporary injunction to prevent the transferee from disposing of the property pendente lite to pay a binding obligation will not be granted. *Rheims v. Bracken-McAveney Co.*, 151 App. Div. 14, 135 N. Y. Supp. 213.

**1495.** An attachment creditor cannot sue in equity, independent of statute, to bring under the lien property alleged to have been transferred by his debtor to a third person, not in possession of the sheriff, and not subject to attachment by the sheriff as property capable of manual delivery. *Hart v. A. L. Clarke & Co.*, 127 App. Div. 679, 111 N. Y. Supp. 886 [affirmed in 194 N. Y. 403, 87 N. E. 808].

**1495** n. 769. Does not apply where summons has been personally served within the state. *Hart v. A. L. Clarke & Co.*, 127 App. Div. 679, 111 N. Y. Supp. 886 [affirmed in 194 N. Y. 403, 87 N. E. 808].

**1496** § 1143. Application should not be denied because of want of notice to the nonresident defendant. *Hall v. Tevis*, 139 App. Div. 636, 124 N. Y. Supp. 48.



**1497.** In such an action, it is no defense that the warrant of attachment is voidable, where it is not void. *Rogers v. Ingersoll*, 103 App. Div. 490, 93 N. Y. Supp. 140.

**1497 n. 780.** The leave of the court to bring the action refers to the court in which the action is brought, and not to the court of which the officer who issued the warrant of attachment is a member. *Rogers v. Ingersoll*, 103 App. Div. 490, 93 N. Y. Supp. 140.

**1504 n. 825.** Laws 1906, c. 507, amends section 687 of the Code by striking out the words "and before final judgment," so that now the motion to discharge the attachment may be made after final judgment.

**1507.** Upon the discharge of the attachment, the sheriff has the right remaining in him to retain the property levied upon until his fees and poundage are paid (subdivision 2, § 17, c. 523, p. 940, Laws 1890, as amended by Laws 1892, p. 868, c. 418), but such right gives him no cause of action against a person indebted to the attachment debtor, for poundage, in the absence of special circumstances. *O'Brien v. Manhattan R. Co.*, 45 Misc. 643, 91 N. Y. Supp. 69.

**1509 n. 856.** The phrase "in goods or chattels of a partnership" is changed to "in the property of a partnership," by amendment of this Code provision in 1912 (c. 389), thereby enlarging its scope. The section is also amended by the same provision by omitting the words "who are not defendants in the action."

**1509 n. 859.** This Code provision was amended in 1912 (c. 694) so as to read that the undertaking shall be to the effect that they (the applicants) will pay to the sheriff, on demand, "if judgment is recovered against the defendant whose interest in a partnership is so levied upon," an amount not exceeding a sum, specified in the undertaking, etc. Also, instead of the phrase "goods and chattels," as descriptive of the subject the value of which forms the minimum amount of the undertaking, the word "property" is sub-

stituted in accordance with the amendment of the preceding section.

**1510** § 1151. Where judgment is void because of dissolution of defendant corporation pending the action, there is no liability on the undertaking. *Sinnott v. Hanan*, 156 App. Div. 323, 141 N. Y. Supp. 505.

**1515** § 1154. Where residence shown, attachment vacated notwithstanding evidence of intent to change residence. *Noblett v. Pratt*, 140 App. Div. 924, 125 N. Y. Supp. 393. That complaint and attachment is for a sum in excess of the court's jurisdiction is not ground for vacating in toto. *Fagan v. Raymond Mfg. Co.*, 80 Misc. 638, 141 N. Y. Supp. 948. Failure of the copies of the complaint and affidavit served on defendant with the warrant of attachment, to contain the name of the officer before whom they were verified, is not ground. *Mazurette v. Richard Carle Amusement Co.*, 49 Misc. 604, 99 N. Y. Supp. 1109. Filing petition of bankruptcy within four months, see *King v. Will J. Block Amusement Co.*, 126 App. Div. 48, 111 N. Y. Supp. 102.

**1517** n. 914. *McBride v. Illinois Nat. Bank*, 128 App. Div. 503, 112 N. Y. Supp. 794.

**1518**. Where the ground of attachment is nonresidence the question of residence may be determined on a motion to vacate. *Aspell Wholesale Grocery Co. v. Meeker*, 54 Misc. 55, 104 N. Y. Supp. 493.

**1518** n. 922. *Ludwig v. Pusey & Jones Co.*, 143 App. Div. 290, 128 N. Y. Supp. 72; *Jones v. Hygienic Soap Granulator Co.*, 110 App. Div. 331, 97 N. Y. Supp. 104; *Norden v. Duke*, 106 App. Div. 514, 94 N. Y. Supp. 878.

**1519**. Where motion is based on the original papers, the only question is as to their sufficiency to confer jurisdiction. *Coakley v. Rickard*, 136 App. Div. 489, 121 N. Y. Supp. 280. Identity of attachment debtor with judgment debtor, in action on judgment, where debtor is named in judgment by

the initials of his given name, cannot be questioned. *Coakley v. Rickard*, 136 App. Div. 489, 121 N. Y. Supp. 280.

**1519 n. 925.** *Coakley v. Rickard*, 136 App. Div. 489, 121 N. Y. Supp. 280. Where a defendant moves to vacate an attachment solely upon the affidavit upon which it was granted, the plaintiff is entitled to all the legitimate inferences and deductions that can be made from the facts stated. *Brandly v. American Butter Co.*, 130 App. Div. 410; *Bendure v. Bidwell*, 82 Misc. 33, 143 N. Y. Supp. 97.

**1519 n. 927.** *Ludwig v. Pusey & Jones Co.*, 143 App. Div. 290, 128 N. Y. Supp. 72; *Atkins v. Fitzpatrick*, 57 Misc. 341, 109 N. Y. Supp. 619. Defects in the complaint will not be considered on a motion to vacate the attachment. *Shepherd v. Shepherd*, 51 Misc. 418, 100 N. Y. Supp. 401. Complaint will not be examined with same critical care as on demurrer. *John D. Elwell Co. v. Acme Portland Cement Co.*, 154 App. Div. 122, 138 N. Y. Supp. 1004.

**1520 n. 939.** *Ennis v. Untermeyer*, 93 App. Div. 375, 87 N. Y. Supp. 695; *Van Wickle v. Weaver Coal & Coke Co.*, 88 App. Div. 603, 85 N. Y. Supp. 82.

**1521 n. 940.** *McBride v. Illinois Nat. Bank*, 128 App. Div. 503, 112 N. Y. Supp. 794.

**1524 n. 968.** *Pedersen Mfg. Co. v. Walter Automobile Co.*, 124 App. Div. 321, 108 N. Y. Supp. 886.

**1525 n. 975.** *Hilborn v. Pennsylvania Cement Co.*, 145 App. Div. 442, 129 N. Y. Supp. 957.

**1525 n. 977.** *Brandley v. American Butter Co.*, 60 Misc. 547, 112 N. Y. Supp. 1030.

**1527 § 1159.** The entry of an order vacating the attachment does not annul the warrant of attachment. *Norden v. Duke*, 47 Misc. 473, 95 N. Y. Supp. 940.

**1529 n. 1001.** See *Milliken v. Fidelity & D. Co.*, 129 App. Div. 206, 113 N. Y. Supp. 809. Where an appeal has been taken from a judgment for defendant, but no security is given to stay proceedings, the attachment is annulled, and hence further security for the attachment cannot be required.

**Flick v. Wyoming Valley Trust Co.**, 149 App. Div. 546, 133 N. Y. Supp. 1066.

**1534 n. 1025.** This Code provision refers only to property actually in possession of the sheriff. Where notice is served on a person indebted to the attachment debtor, but no money is paid over, and thereafter the attachment is vacated by the giving of an undertaking, the sheriff cannot sue the person indebted to the attachment debtor, to recover his fees. **O'Brien v. Manhattan R. Co.**, 45 Misc. 643, 91 N. Y. Supp. 69. Fees must be paid notwithstanding the giving of a bond to discharge the attachment. **Jones v. Gould**, 119 App. Div. 817, 104 N. Y. Supp. 935.

**1535 n. 1029.** See also **Norden v. Duke**, 47 Misc. 473, 95 N. Y. Supp. 940.

**1539 § 1173.** Subdivision one of section 708 of the Code does not authorize the sale of an unliquidated claim. **Arkenburgh v. Arkenburgh**, 114 App. Div. 436, 99 N. Y. Supp. 1127 [affirmed in 188 N. Y. 552].

**1541 n. 1043.** Construction of this subdivision, see **Arkenburgh v. Arkenburgh**, 114 App. Div. 436, 99 N. Y. Supp. 1127. Subdivision 2 of this Code provision was amended in 1912 (c. 40) by adding after the word "negotiable" the words "or otherwise, whether past due, or yet to become due." In an action under subdivision 4, injunction restraining payment of amount in controversy held a defense. **Shea v. Conant**, 149 App. Div. 583, 134 N. Y. Supp. 315.

**1546.** Opening of judgment in the attachment action is a defense. **Bromberger v. Worth**, 80 Misc. 502, 141 N. Y. Supp. 569.

**1548 § 1179.** Under § 1423 of the Code, which provides that upon granting the order of substitution the court in its discretion may require the indemnitors to pay the reasonable expenses of the sheriff necessarily incurred before the order is granted, no costs will be allowed the sheriff whose counsel is a salaried officer of the county, but the court under sec-

tion 3226 may award motion costs to the sheriff. *Coddington v. Harburger*, 77 Misc. 211, 137 N. Y. Supp. 536.

## CHAPTER IV

### TEMPORARY INJUNCTION

**1557.** Prior to trial, permanent injunction cannot be granted. *Oppenheim v. Thanasoulis*, 123 App. Div. 494, 108 N. Y. Supp. 505.

**1558 n. 10.** *Bachman v. Harrington*, 184 N. Y. 458, 77 N. E. 657, holding, however, that the court has no power to grant a mandatory preliminary injunction where the act sought to be enforced is not continuous in its character but solely the one sought to be enforced by final judgment.

**1558 n. 11.** The court will seldom grant a mandatory injunction pendente lite unless the plaintiff's right is so clear that the denial would be either captious or unconscionable. *West Side Elec. Co. v. Consolidated T. & E. S. Co.*, 87 App. Div. 550, 84 N. Y. Supp. 1052.

**1558 § 1183.** A statute providing for a temporary injunction should not be construed as mandatory. *People v. Clark*, 139 App. Div. 687, 124 N. Y. Supp. 527.

**1559 § 1185.** Leave of court is necessary. *McCall Co. v. Wright*, 135 App. Div. 424, 119 N. Y. Supp. 1011. A second application for an injunction upon the original complaint which has been held insufficient is not allowable. *South Shore I. Co. v. Town of Brookhaven*, 53 Misc. 392, 102 N. Y. Supp. 75.

**1559 n. 20.** See *Hein v. N. Y. Stock Exch.*, 138 App. Div. 96, 122 N. Y. Supp. 872; *Duton & Co. v. Cupples*, 117 App. Div. 172, 102 N. Y. Supp. 309. Where there is a dispute as to the facts, Appellate Division will rarely interfere with granting or denial of injunction. *Matter of Whitten*, 152 App. Div. 506, 137 N. Y. Supp. 360.

**1560** n. 29. See *Strickland v. National Salt Co.*, 94 N. Y. Supp. 936.

**1561** § 1189. Not granted where remedy at law not shown to be inadequate. *Peerless Pattern Co. v. Pictorial Review Co.*, 147 App. Div. 715, 132 N. Y. Supp. 37. Not granted where moving papers do not show that contract sought to be set aside was necessarily illegal. *New York Motion Picture Co. v. Universal Film, etc., Co.*, 77 Misc. 581, 137 N. Y. Supp. 278. Not granted because of an alleged breach of contract where parties are solvent and restitution may be directed. *Metzger v. Knox*, 77 Misc. 271, 136 N. Y. Supp. 681. In action for separation from bed and board, an injunction will not be granted restraining defendant from cohabiting with another woman. *Ellis v. Ellis*, 55 Misc. 34, 106 N. Y. Supp. 217. Appeal from order denying should be discouraged where action could have been tried before appeal could be heard. *Flynn v. N. Y., Westchester, etc., Ry. Co.*, 135 App. Div. 743, 119 N. Y. Supp. 858.

**1561** n. 37. *Matter of Halle*, 160 App. Div. 369, 145 N. Y. Supp. 388; *Brockway v. Miller*, 144 App. Div. 239, 128 N. Y. Supp. 1079; *Matter of Dietz*, 138 App. Div. 283, 122 N. Y. Supp. 1063; *Bachman v. Harrington*, 184 N. Y. 458, 77 N. E. 657. See also *Moir v. Provident Savings Life Assur. Society of New York*, 127 App. Div. 591, 112 N. Y. Supp. 57.

**1561** n. 39. *Hart v. A. L. Clarke & Co.*, 127 App. Div. 679, 111 N. Y. Supp. 886 [affirmed in 194 N. Y. 403; 87 N. E. 808].

**1562** n. 40. *Glascoe v. Willard*, 44 Misc. 166, 89 N. Y. Supp. 791.

**1562** n. 41. *West v. Guaranty Trust Co.*, 83 Misc. 609, 145 N. Y. Supp. 634. See *Butler v. Butler*, 91 App. Div. 327, 86 N. Y. Supp. 586.

**1562** n. 42. See also *Floyd Jones v. United Electric Light Co.*, 55 Misc. 529, 106 N. Y. Supp. 648. Injunction

against police officers to restrain picketing in front of and about plaintiff's premises refused where plaintiff's good faith and the nature of his business was not clearly shown. *Craushaw v. McAdoo*, 47 Misc. 420, 94 N. Y. Supp. 386.

1562 n. 44. *Maloney v. Katzenstein*, 135 App. Div. 224, 120 N. Y. Supp. 418.

1562 n. 46. *United States Title Guaranty Co. v. Brown*, 158 App. Div. 542, 143 N. Y. Supp. 835; *Newgold v. Childs Co.*, 148 App. Div. 153, 132 N. Y. Supp. 366.

1562 n. 48. *Butterick Pub. Co. v. Typographical Union No. 6*, 50 Misc. 1, 100 N. Y. Supp. 292. Rule applied in refusing a temporary injunction to restrain police authorities from interfering with baseball games on Sunday. *Brighton Athletic Club v. McAdoo*, 47 Misc. 432, 94 N. Y. Supp. 391.

1562 n. 50. See *Flynn v. New York, Westchester, etc., Ry. Co.*, 135 App. Div. 743, 119 N. Y. Supp. 858.

1563. Will be granted where very great detriment is likely to ensue if not granted, and defendant will not be harmed. *Smith v. Taranto*, 140 N. Y. Supp. 794. Should not be granted where moving papers do not show that the act is in itself unlawful or that it cannot be done in a way not objectionable to plaintiff. *Maloney v. Katzenstein*, 135 App. Div. 224, 120 N. Y. Supp. 418. Where act sought to be enjoined had been performed for nineteen years without objection, the damages claimed were small, the defendant is solvent, and great injury might result to defendant, an injunction should not be granted. *Maloney v. Katzenstein*, 135 App. Div. 224, 120 N. Y. Supp. 418. Offer to remove cause of complaint as ground for refusing, see *Newgold v. Childs Co.*, 148 App. Div. 153, 132 N. Y. Supp. 366.

1563 n. 56. *Rau v. Seidenberg*, 53 Misc. 386, 104 N. Y. Supp. 798.

1563 n. 58. *Barzilay v. Lowenthal*, 134 App. Div. 502, 119 N. Y. Supp. 612; *Moses v. Saloman*, 150 App. Div.

563, 135 N. Y. Supp. 408. Should be granted with great caution and only in case of necessity. *Western New York Water Co. v. Laughlin*, 82 Misc. 496, 143 N. Y. Supp. 737.

1564 n. 61. *Sullivan Advertising Co. v. Goldsticker*, 73 Misc. 291, 130 N. Y. Supp. 1021.

1564 n. 62. *Howley v. Press*, 127 App. Div. 646, 111 N. Y. Supp. 1080. See *Newgold v. Childs Co.*, 148 App. Div. 153, 132 N. Y. Supp. 366.

1565. In action to set off judgments, temporary injunction is proper to prevent collection of judgment for costs held by an insolvent. *Title Guarantee & T. Co. v. Brown*, 141 App. Div. 14, 125 N. Y. Supp. 780.

1567. In an action to restrain the sale of goods under a certain name, where the controversy grows out of the dissolution of the firm, it is proper to enjoin pendente lite the retiring partners from using such name to obtain the trade of the old firm. *Steinfeld v. National Shirt Waist Co.*, 99 App. Div. 286, 90 N. Y. Supp. 964.

1567 n. 91. *Greenwald v. Gotham-Attucks Music Co.*, 118 App. Div. 29, 103 N. Y. Supp. 123. This Code subdivision does not authorize a mandatory injunction for reinstatement in a voluntary association, since the reinstatement would not be restrained but would be enforced by the final judgment. *Bachman v. Harrington*, 184 N. Y. 458, 77 N. E. 657. The act must be such a one as "will produce injury to the plaintiff." *George Ringler & Co. v. Mohl*, 115 App. Div. 549, 101 N. Y. Supp. 454.

1567 n. 93. *Uppercu v. Stevens*, 160 App. Div. 918, 145 N. Y. Supp. 699; *Ellis v. Ellis*, 55 Misc. 34, 106 N. Y. Supp. 217; *Fleisch v. Schnaier*, 119 App. Div. 815, 104 N. Y. Supp. 921; *Gillette v. Noyes*, 92 App. Div. 313, 86 N. Y. Supp. 1062.

1567 n. 94. Erratum—The statement that "it has been held that the temporary injunction must be demanded in the complaint" is not borne out by the cases cited which refer to a demand for a permanent injunction.



**1567** § 1191. In action for deceit in inducing a sale, where plaintiff gave notes in part payment, defendant will not be enjoined from negotiating such notes *pendente lite*. *Goldin v. Tauster*, 68 Misc. 459, 125 N. Y. Supp. 83.

**1568**. See also *Platt v. Elias*, 101 App. Div. 518, 91 N. Y. Supp. 1079.

**1568** n. 97. *Farrelly v. New York Life Ins. Co.*, 52 Misc. 202, 102 N. Y. Supp. 726.

**1570** n. 114. See *Brockway v. Miller*, 144 App. Div. 239, 128 N. Y. Supp. 1079.

**1570** n. 119. See also *post*, **1590** § 1207. The Code provision cited in the note should be § 606 instead of § 607. The following sentence is added by amendment in 1913: "An injunction order which may be modified or vacated by the Appellate Division may also be granted or continued by the Appellate Division, or a justice thereof, pending appeal to that court or to the Court of Appeals from an order or judgment denying or vacating an injunction."

**1571** nn. 122, 123. Section 1787 of the Code is now Cons. Laws, c. 23, § 103. Section 1806 is c. 23, § 302, and section 1809, is, in part, c. 23, § 305.

**1573** n. 135. *Town of Ft. Edward v. Hudson Valley R. Co.*, 127 App. Div. 438, 111 N. Y. Supp. 753 [quoting 2 *Nichols' New York Pr.* 1573].

**1574**. Whether the application is based on section 603 or 604 of the Code, the order should not be granted except on proof that plaintiff has a cause of action. *Werbelovsky v. Michael*, 106 App. Div. 138, 94 N. Y. Supp. 156. In determining whether the cause of action against a foreign corporation arose within the state, the allegations of the pleadings alone may be considered. *Rosenblatt v. Jersey Novelty Co.*, 45 Misc. 59, 90 N. Y. Supp. 816.

**1574** n. 145. *Gillette v. Noyes*, 92 App. Div. 313, 86 N. Y. Supp. 1062.

**1575** n. 149. *Goldman v. Corn*, 111 App. Div. 674, 97

N. Y. Supp. 926; *Leonard v. Schmidt*, 109 App. Div. 549, 96 N. Y. Supp. 49; *Glascoc v. Willard*, 44 Misc. 166, 89 N. Y. Supp. 791.

**1575** n. 151. *Wood v. Cook*, 132 App. Div. 318, 117 N. Y. Supp. 51.

**1575** n. 152. *Loewenstein v. Loewenstein*, 114 App. Div. 65, 99 N. Y. Supp. 730.

**1575** n. 155. *New York & New Jersey Telephone Co. v. Rosenthal*, 128 App. Div. 220, 112 N. Y. Supp. 612.

**1576**. Conflicting affidavits as ground for refusing, see *Western New York Water Co. v. Laughlin*, 82 Misc. 496, 143 N. Y. Supp. 1144.

**1576** n. 157. Affidavits on information and belief held sufficient without getting affidavits of persons making statements relied on in affidavits. *Freeman v. United States Talc Co.*, 151 App. Div. 732, 136 N. Y. Supp. 233.

**1578** n. 169. *People v. New York Carbonic Acid Gas Co.*, 128 App. Div. 42, 112 N. Y. Supp. 381; *Howley v. Press*, 127 App. Div. 646, 111 N. Y. Supp. 1080 (holding, however, defect may be cured on appeal by offer to file nunc pro tunc).

**1578** § 1198. As condition of granting order, court may, in a proper case, require undertaking not only to indemnify for damages from the injunction but also to secure indebtedness. *American Exchange Nat'l Bank v. Goubert*, 135 App. Div. 371, 120 N. Y. Supp. 397.

**1580** n. 191. "The word 'damages' in section 611 does not include a recovery upon an equitable counterclaim interposed in an injunction suit in respect to which counterclaim the defendant is the actor and occupies the position of a plaintiff. It relates to damages which the enjoined party may be able to show that he has sustained by reason of the injunction under section 623 of the Code of Civil Procedure which provides for the ascertainment of such damages by the court or by a referee or by a writ of inquiry." *Brace Co. v. Kraft*, 196 N. Y. 468, 470.

**1582 § 1202.** Payment into court as dispensing with necessity for undertaking, see *New York & New Jersey Telephone Co. v. Rosenthal*, 128 App. Div. 220, 112 N. Y. Supp. 612.

**1583 § 1203.** Order granted in one action enjoining defendant from disposing of his real estate is not effective in another action. *Barnes v. Midland R. T. Co.*, 153 App. Div. 365, 138 N. Y. Supp. 546.

**1583 n. 209.** But where the order restrains the prosecution of an action at law, it should require the plaintiff to give the security provided for by section 611 of the Code. *Werblovsky v. Michael*, 106 App. Div. 138, 94 N. Y. Supp. 156.

**1583 n. 210.** Omission is a fatal defect. *Brockway v. Miller*, 144 App. Div. 239, 128 N. Y. Supp. 1079.

**1584.** The order can have no extraterritorial force. *Rosenblatt v. Jersey Novelty Co.*, 45 Misc. 59, 90 N. Y. Supp. 816.

**1584 n. 212.** The irregularity may be disregarded. *Terry v. Green*, 53 Misc. 10, 103 N. Y. Supp. 1014.

**1587 § 1206.** The order will not be construed to restrain acts beneficial and not injurious to the rights of the other party, unless its words clearly have that effect. *Maine Products Co. v. Alexander*, 115 App. Div. 475, 101 N. Y. Supp. 464.

**1588 n. 244.** So held where labor union, its agents, servants, etc., was enjoined from interfering with nonunion men. *People ex rel. Stearns v. Marr*, 181 N. Y. 463, 74 N. E. 431.

**1588 n. 247.** Unless party can control his conduct. *Matter of Zimmerman*, 134 App. Div. 591, 119 N. Y. Supp. 275.

**1588 n. 252.** Strikers who are members of a union enjoined from doing certain acts may be punished for disobedience of the injunction though it was not personally served on them. *People ex rel. Stearns v. Marr*, 181 N. Y. 463, 74 N. E. 431.

**1589.** It is no excuse that the original order was modified on appeal, if affirmed in its essential parts. *Hathorn v. Natural Carbonic Gas Co.*, 137 App. Div. 557, 121 N. Y. Supp. 383. Unintentional violation doing no damage not punishable as a contempt. *Strawberry Island Co. v. Cowles*, 79 Misc. 279, 140 N. Y. Supp. 333. Failure of plaintiff to comply with order precludes punishment of defendant. *Ziegfeld v. Norworth*, 148 App. Div. 185, 133 N. Y. Supp. 208.

**1589 n. 259.** But see *Jones v. Burgess*, 109 App. Div. 888, 96 N. Y. Supp. 873.

**1589 n. 260.** *Hathorn v. Natural Carbonic Gas Co.*, 137 App. Div. 557, 121 N. Y. Supp. 683.

**1590 n. 261.** It is a defense where the proceeding is to punish as for a civil contempt. *Bachman v. Harrington*, 184 N. Y. 458, 77 N. E. 657.

**1590 n. 262.** *Ziegfeld v. Norworth*, 148 App. Div. 185, 133 N. Y. Supp. 208.

**1590 § 1207.** "Prior to September 1, 1913, the statute regulating the granting of injunction orders pending the trial of an action was as follows: 'Except where it is otherwise specially prescribed by law, an injunction order may be granted by the court in which the action is brought, or by a judge thereof, or by any county judge; and where it is granted by a judge, it may be enforced as the order of the court.' (Code Civ. Proc., § 606.) Construing a similar provision of the Code of Procedure (§ 218), it was held that when the court at Special Term, after argument, had denied an application for a temporary injunction, there was no power in an appellate tribunal to revive and continue that injunction pending an appeal from such order or judgment. *Spears v. Mathews*, 66 N. Y. 127. In 1913 the section above referred to was amended by adding thereto the following clause: 'An injunction order which may be modified or vacated by the Appellate Division may also be

granted or continued by the Appellate Division, or a justice thereof, pending appeal to that court or to the Court of Appeals from an order or judgment denying or vacating an injunction.' (Laws of 1913, chap. 112.) The language of this amendment is not entirely clear. The first clause thereof, literally construed, would seem to say that if an injunction order had been granted by the court at Special Term and an appeal had been taken therefrom, the Appellate Division or a justice thereof might continue such restraining order pending such appeal. Such a construction would be absurd. Remembering the difficulty which was to be overcome, we think that we do not transgress the limits of judicial construction if we transpose its clauses, adding thereto two words. It would then read as follows: 'Pending appeal to the Appellate Division or to the Court of Appeals from an order or judgment denying or vacating an injunction, an injunction order which, if granted, may be modified or vacated by the Appellate Division may also be granted, or continued by the Appellate Division or a justice thereof.' " *United States Title Guaranty Co. v. Brown*, 158 App. Div. 542, 143 N. Y. Supp. 835 (holding that Appellate Division may continue injunction pending appeal).

**1591** § 1208. Where defendant states it does not intend to do the act enjoined until its right to do so is determined, a temporary injunction is properly continued. *Whitmore v. New York, etc., Water Co.*, 156 App. Div. 892, 141 N. Y. Supp. 1151. Discretion exercised in continuing will not be interfered with where the court has exercised sound judgment to promote justice. *Smith & Sons Carpet Co. v. Ball*, 137 App. Div. 100, 122 N. Y. Supp. 187. Injunction held properly continued pending a taxpayer's action. *Shieeler v. Ireland*, 140 N. Y. Supp. 861.

**1593** § 1211. There is some question whether, where a temporary injunction has been granted in one county and the place of trial has been changed to another county,

the Special Term of the latter county has power to vacate the injunction. *McGorie v. McAdoo*, 113 App. Div. 271, 99 N. Y. Supp. 47.

**1593** n. 294. *Bodenstein v. Saul*, 132 App. Div. 628, 117 N. Y. Supp. 349.

**1594** n. 299. One not injured cannot move. *Bodenstein v. Saul*, 132 App. Div. 628, 117 N. Y. Supp. 349.

**1595** n. 303. *Devlin v. McAdoo*, 116 App. Div. 224, 101 N. Y. Supp. 546.

**1597** n. 336. *Ellis v. Ellis*, 55 Misc. 34, 106 N. Y. Supp. 217.

**1604** n. 384. Compare *New York v. Brown*, 179 N. Y. 303, 72 N. E. 114.

**1604** n. 386. *Slingerland v. Albany Typographical Union*, 115 App. Div. 15, 100 N. Y. Supp. 569; *McGown v. Barnum*, 42 Misc. 585, 87 N. Y. Supp. 605.

**1604** n. 387. An interlocutory judgment sustaining a demurrer is not a final determination. *Brown v. Utopia Land Co.*, No. 1, 118 App. Div. 190, 103 N. Y. Supp. 53.

**1605** n. 389. To same effect, see *Wilson v. Wilson*, 130 App. Div. 70, 114 N. Y. Supp. 455.

**1605** n. 391. *McGown v. Barnum*, 42 Misc. 585, 87 N. Y. Supp. 605. See also *In re Reed*, 110 N. Y. Supp. 834. A discontinuance on stipulation, and the vacation of the injunction pursuant to such stipulation, does not, however, constitute an adjudication that plaintiff was not entitled to the injunction. *Freifeld v. Sire*, 96 App. Div. 296, 89 N. Y. Supp. 260.

**1606** n. 395. *American Exch. Nat. Bank v. Goubert*, 135 App. Div. 371, 120 N. Y. Supp. 397.

**1606** § 1227. Damages in excess of the amount of the undertaking may be found by the referee. *Harrison v. Hind & Harrison Plush Co.*, 128 App. Div. 460, 112 N. Y. Supp. 834.

**1607** n. 402. No assessment of damages, pursuant to

§ 623 of the Code, is necessary before suing on the undertaking where it is broader than a statutory undertaking *American Exch. Nat. Bank v. Goubert*, 135 App. Div. 371, 120 N. Y. Supp. 397. That order is an order in an action and not in a special proceeding was the ground on which the appeal was dismissed in *Keator v. Dalton*, 171 N. Y. 650, 63 N. E. 1118, without opinion. The case of *Lawton v. Green*, 64 N. Y. 326, is to the contrary.

**1607** n. 406. Proceeding cannot be entertained by state court where the action has been removed to a federal court. *Byrne v. Lathrop, Shea & Henwood Co.*, 60 Misc. 350, 112 N. Y. Supp. 273.

**1610.** It is no defense to proceedings to ascertain damages that the operation of the injunction was suspended pending an appeal from an order continuing the injunction. *In re Reed*, 125 App. Div. 884, 110 N. Y. Supp. 834.

**1611** n. 442. The language of the bond cannot be enlarged by reference to the terms of the order granting it. *American Exch. Nat. Bank v. Goubert*, 210 N. Y. 421, 104 N. E. 928 [where the court said: "We are thus confronted by an order which requires an undertaking not merely to pay the damages resulting from the injunction, but also to pay the debt, and a bond given in assumed compliance with the order, which is confined to the payment of the damages alone. The question is, how far conditions in respect of which the bond is silent may be incorporated into it so as to conform its meaning to the requirements of the order. That this bond was supposed to constitute a compliance with the order is not doubtful. The fact that it was made with that intent is stated in substance in its recitals. If the meaning of the bond were doubtful or ambiguous, we should have the right, in view of those recitals, to limit or to enlarge its operation accordingly. (*Sonneborn v. Libbey*, 102 N. Y. 539, 550; *Elmendorf v. Lansing*, 5 Cow. 468; *Smith v. Molleson*, 148 N. Y. 241, 246.) We think, however, that a

court is without power to interpolate a new condition into a bond that is free from ambiguity in order to force a correspondence between the bond and the order under which it was executed. The order may be referred to for the purpose of explaining a doubtful phrase, but not for the purpose of inserting a new condition, and thus reforming the contract."']

**1611** n. 443. *Harrison v. Hind & Harrison Plush Co.*, 128 App. Div. 460, 112 N. Y. Supp. 834.

**1612.** Where a motion for an injunction has been denied and a preliminary injunction set aside, defendant is entitled to counsel fees incurred on the return to the order to show cause, where the injunction might have remained in force had defendant failed to appear. *Reeves v. Sullivan*, 117 App. Div. 814, 102 N. Y. Supp. 1003. In an action in a state court on an injunction bond given in a federal court, counsel fees are not recoverable. *National Society of United States Daughters of 1812 v. American Surety Co.*, 56 Misc. 627, 107 N. Y. Supp. 820.

**1612** n. 455. The costs and expenses of opposing a motion made upon an order to show cause why an injunction pendente lite should not be granted, although the temporary restraining order is limited to expire upon the hearing of the motion, are recoverable as damages because of the preliminary injunction. *Sargent v. St. Mary's Orphan Boys' Asylum*, 190 N. Y. 394, 83 N. E. 38 [reversing 112 App. Div. 674, 98 N. Y. Supp. 632, which distinguished *Perlman v. Bernstein*, 93 App. Div. 335, 87 N. Y. Supp. 826 (affirmed in 179 N. Y. 531)], holding that it is immaterial that the injunction was vacated on the return of an order to show cause why the temporary injunction granted by such order should not be continued pendente lite, on the ground that in the latter case the preliminary injunction continued until the further order of the court.

**1613** n. 456. See, as contra, *McGown v. Barnum*, 42 Misc. 585, 87 N. Y. Supp. 605.



**1613** n. 462. Granulator Soap Co. v. Haddow, 159 App. Div. 563, 144 N. Y. Supp. 610.

**1614** n. 466. Brooks v. Racich Asbestos Mfg. Co., 137 App. Div. 280, 121 N. Y. Supp. 850.

**1614** n. 468. Brooks v. Racich Asbestos Mfg. Co., 137 App. Div. 280, 121 N. Y. Supp. 850; Perlman v. Bernstein, 93 App. Div. 335, 87 N. Y. Supp. 862 [affirmed in 179 N. Y. 531].

## CHAPTER V

### RECEIVERS

**1622.** Right where defendant is solvent, see Joseph v. Herzig, 130 App. Div. 707, 115 N. Y. Supp. 330.

**1622** n. 19. Hastings v. Tousey, 121 App. Div. 815, 106 N. Y. Supp. 639. And see Bimberg v. Wagenthols, 53 Misc. 13, 102 N. Y. Supp. 925.

**1623** § 1238. Must show danger of removal or loss. Rapaport v. Otten, 135 App. Div. 386, 120 N. Y. Supp. 461.

**1624** n. 23. Morse v. Van Ness, 155 App. Div. 633, 140 N. Y. Supp. 1043.

**1624** n. 24. Pomerantz v. Mintz Realty Co., 141 App. Div. 864, 126 N. Y. Supp. 649; Bimberg v. Wagenthols, 53 Misc. 13, 102 N. Y. Supp. 925.

**1631** n. 67. If party is in default, notice is not necessary. Conroy v. Polstein, 150 App. Div. 833, 135 N. Y. Supp. 419. Effect of stipulation that notice should be given, see Woerishoffer v. Peoples, 120 App. Div. 319, 105 N. Y. Supp. 506.

**1631** n. 67a. Otherwise notice is necessary. Jormulowsky v. Rosenbloom, 125 App. Div. 542, 109 N. Y. Supp. 968.

**1634** n. 89. Edgerley v. Blackburn, 140 App. Div. 419, 125 N. Y. Supp. 353. This Code section also applies to a receiver appointed in a matrimonial action. Matter of Spies, 92 App. Div. 175, 86 N. Y. Supp. 1043.

**1635 n. 95.** But the failure of the order to require a bond does not excuse the refusal to deliver over property to the receiver. *Matter of Spies*, 92 App. Div. 175, 86 N. Y. Supp. 1043.

**1639 § 1255.** Common-law receiver has no standing in an outside action to apply for relief against an order therein. *Matter of Foster*, 139 App. Div. 769, 124 N. Y. Supp. 667.

**1641 § 1257.** Compare *Foster v. Foster*, 98 App. Div. 24, 90 N. Y. Supp. 451, as to duty of receiver to surrender possession.

**1641 n. 132.** But see *Beardslee v. Ingraham*, 183 N. Y. 411, 76 N. E. 476 [reversing 106 App. Div. 506, 94 N. Y. Supp. 937].

**1645 § 1260.** An amendment in 1911 adds a new subdivision (4) which provides a method whereby the judgment debtor may pay the amount of the judgment with interest into court, and have the judgment marked "satisfied and discharged by deposit." The provision is lengthy and should be referred to for details.

**1646 n. 172.** By Laws 1909, c. 65, this Code provision is amended so as to apply only to receivers "appointed by or pursuant to an order or a judgment, in an action in the Supreme Court, or a County Court." Cons. Laws, c. 23, § 243, in part takes the place of this Code provision.

**1647 § 1265.** Receiver appointed in partition suit to collect rents and profits is a chancery or common-law receiver, rather than a statutory receiver, and cannot sue for permanent injuries to the freehold by adjoining owners. *Rinehart v. Hasco Bldg. Co.*, 153 App. Div. 158, 138 N. Y. Supp. 258.

**1647 n. 182.** Leave to sue may be granted *nunc pro tunc*. *De La Fleur v. Barney*, 45 Misc. 515, 92 N. Y. Supp. 926.

**1652 § 1268.** Failure to allege leave to sue a receiver does not render the complaint demurrable. *Di Chiara v. Sutherland*, 62 Misc. 555, 115 N. Y. Supp. 622 [following

Pruyn v. McCreary, 195 App. Div. 302, 93 N. Y. Supp. 995]. Limiting permission to sue to actions in equity, see Atlantic Realty Co. v. Wlodar, 119 App. Div. 850, 104 N. Y. Supp. 843.

**1654** § 1270. An accounting may be compelled where the complaint has been dismissed as to all defendants entitled to the property. Katz v. Freeman, 114 App. Div. 124, 99 N. Y. Supp. 613.

**1654** n. 238. Sureties must have had notice of the accounting. Stratton v. City Trust, etc., Co., 86 App. Div. 551, 83 N. Y. Supp. 780.

**1655** n. 244. The payment of brokerage for procuring a receiver's bond is not a lawful charge as an expense of the receivership, since not a sum paid to his surety under section 3320 of the Code. Adams v. Elwood, 104 App. Div. 138, 93 N. Y. Supp. 327. Where an order appointing a receiver authorizes him to reduce to his possession sufficient property to pay plaintiff's claim as it should eventually be established, the receiver should be allowed the five per cent. commission computed on the total value of the property acquired by him in endeavoring to discharge his duty in good faith, although that property proved to be more than was in the end actually required to satisfy the judgment recovered. *Id.*

## CHAPTER VI

### DEPOSIT, DELIVERY, OR CONVEYANCE OF PROPERTY

No New Matter Has Been Found for This Chapter.

## PART VI

### PROCEEDINGS OTHER THAN PLEADING AFTER COMMENCEMENT OF ACTION AND BEFORE TRIAL

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#### CHAPTER I

##### SETTING CASE FOR TRIAL OR HEARING

**1661.** Section 474 of the Code was amended by Laws 1904, c. 747, by adding the following clause: "The Appellate Division of each department may provide by rule for the manner of taking up calendars in each county embraced within the department; and for the classification for the purpose of trial, of actions placed on such calendars; and may also provide for the making up of two or more calendars within such classification." Trial calendar practice in the counties of Westchester, Kings and Queens, see *Herbert Land Co. v. Lorenzen*, 113 App. Div. 802, 99 N. Y. Supp. 937.

**1661 § 1275.** Trial calendar and order of trial, see *Nahe v. Bauer*, 133 App. Div. 373, 117 N. Y. Supp. 355. Under rules in first department, action on a note is entitled to be placed on the special calendar of Trial Term, Part II, although an equitable defense is interposed. *Wasserman v. Pfizer*, 151 App. Div. 724, 136 N. Y. Supp. 203. Striking cause from special calendar and restoring it to general calendar, under Rules regulating Trial Terms in the First Judicial District, see *Miller v. Douglass*, 140 App. Div.

304, 125 N. Y. Supp. 140. Stipulation for trial at a specified Special Term becomes inoperative after that term has passed and the case was not reached. *Jackson v. Rosenbrock*, 69 Misc. 213, 126 N. Y. Supp. 712. Restoring case to general calendar, in Albany county, after case stricken from the calendar under Rule 12 applicable to Albany Trial Terms, see *Frederick v. Oliver*, 154 App. Div. 346, 139 N. Y. Supp. 320. Grounds for striking case from calendar, see *Loper v. Wading River Realty Co.*, 143 App. Div. 167, 127 N. Y. Supp. 1000.

**1661** § 1276. Where evidence all in, it seems that case should not be transferred to the jury calendar. *Maythan v. Eddy*, 155 App. Div. 943, 140 N. Y. Supp. 1131.

**1661** n. 1. Where no facts are alleged upon which the plaintiff would be entitled to equitable relief, yet if the facts stated show a cause of action at law, the case should be stricken from the equity calendar, and transferred to the Trial Term calendar. *Karst v. Prang Educational Co.*, 132 App. Div. 197, 116 N. Y. Supp. 1049.

**1662** § 1277. Notice of trial must be given to a defendant whose answer has raised an issue. *Belmont Powell Holding Co. v. Serial Bldg. Loan & Sav. Inst.*, 158 App. Div. 902, 142 N. Y. Supp. 1108. Where reply is served after service of notice of trial, and new issues are thereby created, either party may move to strike the cause from the calendar. *Grant v. Cananea Consolidated Copper Co.*, 129 App. Div. 77, 113 N. Y. Supp. 502. Where a case was noticed for trial pending an appeal from the overruling of a demurrer to the answer, and before the case was reached on the day calendar the appellate court modified the interlocutory judgment and granted plaintiff leave to reply, and a reply was thereupon served, the right of defendants to retain the case on the calendar or to move for trial pursuant to their original notice of trial was terminated, and a new notice of trial and note of issue required. *Ward v. Smith*, 103 App.

Div. 375, 92 N. Y. Supp. 107 [reversing 45 Misc. 169, 91 N. Y. Supp. 905].

**1662** n. 3. *Grossman v. Silverman*, 71 Misc. 143, 128 N. Y. Supp. 7, 2 Civ. Proc. R. (N. S.) 211; *Murphy v. Lyon*, 127 App. Div. 448, 112 N. Y. Supp. 152.

**1662** n. 5. The rule stated in the text, supported by the case cited, is said in *Murphy v. Lyon*, 127 App. Div. 448, 112 N. Y. Supp. 152, to be overruled by the later decisions.

**1663** n. 8. To same effect, *Muglia v. Erie R. Co.*, 97 App. Div. 532, 90 N. Y. Supp. 216.

**1665** n. 20. Notice of trial cannot be served before the service of the complaint. *Sanders v. People's Co-op. Ice Co.*, 44 Misc. 171, 89 N. Y. Supp. 785. That notice cannot be served, before joinder of issue, though order provides that date of issue be of a date prior to the actual service of the answer, see *Muglia v. Erie R. Co.*, 97 App. Div. 532, 90 N. Y. Supp. 216.

**1665** n. 22. Power of Appellate Division as to calendars, see Cons. Laws, c. 30, § 83.

**1666** n. 28. Followed in *Ward v. Smith*, 45 Misc. 169, 91 N. Y. Supp. 905, which is reversed, on another point, in 103 App. Div. 375, 92 N. Y. Supp. 1107. It seems that the right to move to strike a case from the calendar because notice of trial was filed prior to the joinder of issue is waived where the objecting party also noticed the case for trial at the same term of court (*Muglia v. Erie R. Co.*, 97 App. Div. 532, 90 N. Y. Supp. 216), though it has also been held that service before joinder of issue is a nullity and not waived by the failure to return the notice. *Sanders v. People's Co-op. Ice Co.*, 44 Misc. 171, 89 N. Y. Supp. 785.

**1667** n. 32. *Rosenthal v. Friedman*, 60 Misc. 553, 112 N. Y. Supp. 449.

**1668** § 1278. Of course the note of issue cannot be filed until after the case is noticed for trial. *McMann v. Brown*, 92 App. Div. 249, 87 N. Y. Supp. 38. But the filing of a note

of issue before service of a notice of trial, where both are done on the same day, is not ground for striking the cause from the calendar. *Lederer v. Adler*, 44 Misc. 217, 88 N. Y. Supp. 1010.

**1670 n. 48.** See *Willner v. Mink Restaurant Co.*, 61 Misc. 73, 113 N. Y. Supp. 31. Rule of City Court of New York City providing otherwise is invalid. *Willner v. Mink Restaurant Co.*, 60 Misc. 358, 113 N. Y. Supp. 633. Section 977 of the Code is amended by Laws 1907, c. 211, by adding to the list of counties the county of Schenectady, and by Laws 1909, c. 65, by adding the county of Westchester. Niagara county was added by amendment in 1912, and Nassau county in 1911, to this list of counties. The provision in § 977 of the Code that causes on the calendar "must remain on the calendar until it is disposed of" means until the court, for good reason, shall dispose of it, as by striking it from the calendar. *Frederick v. Oliver*, 154 App. Div. 346, 139 N. Y. Supp. 320.

**1670 § 1280.** Passing cause pending engagement of counsel, see *Adler v. Joseph Autler Co.*, 140 N. Y. Supp. 1039. In first department, see *Fiesel v. White Sewing Machine Co.*, 134 App. Div. 358, 119 N. Y. Supp. 67. In City Court of New York, see *Leven v. Trilling*, 3 Current Ct. Dec. 7. Passing for day, pursuant to rules in first judicial district, where counsel engaged in federal court, see *Robinson v. De Fere*, 106 App. Div. 406, 94 N. Y. Supp. 847. In the first judicial district a case may be passed where counsel is engaged in the trial of another case. *Spero v. Supreme Council, A. L. H.*, 95 App. Div. 499, 88 N. Y. Supp. 989.

**1672 § 1282.** Rule repealed in 1910 by General Rules of Practice.

**1672 n. 59.** The Code provision only applies where the instrument sued on shows on its face that the plaintiff is entitled to the amount sought to be recovered. *Tautphoeus v. Harbor & S. Bldg. & Sav. Ass'n*, 96 App. Div. 23, 88 N. Y. Supp. 709.

**1673** n. 60. Where amended answer is interposed solely for delay, and if it is not stricken out and plaintiff is required to give a new notice of trial he will lose the benefit of the term for which he had noticed the cause, an order striking out such answer and placing the cause on the short-cause calendar unless defendant complied with certain terms of such order was proper. *Tillinger v. London*, 114 N. Y. Supp. 130.

**1674** n. 63. See also *Schwartz v. Interurban St. R. Co.*, 108 N. Y. Supp. 651; *Rauchberger v. Interurban St. R. Co.*, 52 Misc. 518, 102 N. Y. Supp. 561.

**1674** n. 64. See *Clement v. Mast*, 119 App. Div. 485, 103 N. Y. Supp. 1025. The order of a calendar judge preferring a cause on account of the extreme age of plaintiff will not be interfered with by the Appellate Division. *Hickman v. William Schimper & Co.*, 121 App. Div. 257, 105 N. Y. Supp. 636. The court cannot prefer one action over the other against different parties and substitute a later for a former action upon a mere allegation of an attorney that he made a mistake in bringing the first action which is still pending. *Crawford v. N. Y. City R. Co.*, 108 App. Div. 190, 95 N. Y. Supp. 769. May grant preference to personal injury suit where plaintiff is likely to die before cause will be reached. *Reinertsen v. Erie R. R. Co.*, 66 Misc. 229, 122 N. Y. Supp. 998.

**1674** n. 66. *Woerner v. Star Co.*, 107 App. Div. 248, 94 N. Y. Supp. 1117.

**1675** § 1291. Laws 1906, c. 51, amends subdivision 1 by adding actions brought by the people of the state on the relation of a party. Subdivision 13 of section 791 of the Code, added by amendment in 1902, which authorizes a preference in an action for divorce where temporary alimony has been allowed does not warrant the granting of a motion of a husband who has not obeyed the alimony order. *Fennessy v. Fennessy*, 111 App. Div. 181, 97 N. Y. Supp. 602. The



preference given to actions for divorce does not apply to an action for a separation. *Seligman v. Seligman*, 52 Misc. 9, 100 N. Y. Supp. 770.

**1676 n. 71.** Applies to action against police commissioner of New York City although not a "board." *National Athletic Club v. Bingham*, 63 Misc. 62, 115 N. Y. Supp. 1103.

**1677 n. 73.** But this does not apply where the action is to determine the validity of the probate of a will. *Specht v. Helfer*, 112 N. Y. Supp. 457.

**1677 n. 75.** Conversely when the complaint clearly shows that the action is brought in a representative capacity, the mere omission in the title of the words "as executor," etc., will not defeat the motion. *Chumar v. Melvin*, 112 App. Div. 828, 98 N. Y. Supp. 351. The pleadings, however, where a part of the motion papers, are sufficient to show that the action is against an administratrix in her official capacity. *Jackson v. Jackson*, 44 Misc. 44, 89 N. Y. Supp. 715.

**1677 n. 76.** By Laws 1906, c. 6, the Code section is amended so as to include a receiver appointed by the court "or by the comptroller of the currency of the United States."

**1678 subd. 8.** Rule applies to action against foreign corporations as well as to actions against domestic corporations. *Martin's Bank v. Amazonas Co.*, 98 App. Div. 146, 90 N. Y. Supp. 734.

**1679 § 1291.** The age of a plaintiff, of itself, is not ground for a preference, no physician's sworn statement as to his health being furnished. *Crawford v. N. Y. City R. Co.*, 108 App. Div. 190, 95 N. Y. Supp. 769.

**1680 n. 90.** That plaintiff is old and sick is not ground, his deposition having been taken. *McIntire v. National Nassau Bank*, 150 App. Div. 668, 135 N. Y. Supp. 760.

**1681 § 1293.** Prevailing party should serve copy of order granting motion. *Donegan & Swift v. Patterson*, 125 App. Div. 750, 110 N. Y. Supp. 98. It is no ground for refusing

to advance case for trial on short cause calendar that plaintiff had figured on natural delay and the granting of the motion would prevent him from recovering all his damages. *Jaffe v. Mindlin*, 110 N. Y. Supp. 978. Obtaining a preference does not preclude putting a case on the short cause calendar in the City Court of New York. *Terraca v. Aaron Miller Realty Co.*, 54 Misc. 84, 104 N. Y. Supp. 496.

**1681** n. 95a. In action on note, counterclaim for fraud does not preclude putting case on short cause calendar, nor does fact that defendant has sued separately for the fraud and desires to have it tried first. *Sells v. Autographic Register Co.*, 150 App. Div. 389, 134 N. Y. Supp. 1085.

**1682** n. 96. In New York City Court, if cause not completed within two hours, it cannot be set down for a particular day on the general calendar. *Birdsey-Somers Co. v. Sleeper*, 77 Misc. 143, 135 N. Y. Supp. 1075. Motion in City Court of New York as premature, see *John Simmons Co. v. Shattuck*, 106 N. Y. Supp. 1032; *Eisenstein v. Old Dominion S. S. Co.*, 56 Misc. 335, 106 N. Y. Supp. 857.

**1682** n. 99. *Specht v. Helfer*, 112 N. Y. Supp. 457.

**1687.** The 1904 amendment, as set forth herein, was held unconstitutional in *Riglander v. Star Co.*, 98 App. Div. 101, 90 N. Y. Supp. 772 [affirmed in 181 N. Y. 531], as depriving the judiciary of the right to regulate the hearing of preferred causes according to the circumstances of each particular case, and as tending to deprive litigants of their property without due process of law. It follows that the granting of the motion now is discretionary, subject to the rules laid down in the text. In *People v. McClellan*, 56 Misc. 123, 106 N. Y. Supp. 200, the *Riglander* decision is construed as not preventing the court naming a day of the term on which the case will be moved for immediate trial. Where, after note of issue filed and notice of trial served and claim for preferences made, defendant serves an amended answer, the case is not on the day calendar and a preference cannot be granted.

Van Norden Trust Co. v. Murphy, 125 App. Div. 369, 109 N. Y. Supp. 725.

**1687** n. 120a. Thompson v. Post & McCord, 125 App. Div. 397, 109 N. Y. Supp. 724.

**1687** n. 120b. Followed in Carroll v. Pennsylvania Steel Co., 96 App. Div. 165, 89 N. Y. Supp. 199.

**1687** n. 120c. Peck v. Maher, 116 N. Y. Supp. 574; Gehrt v. Deane, 109 N. Y. Supp. 679; Gegan v. Union Trust Co., 120 App. Div. 382, 105 N. Y. Supp. 243; Ortner v. New York City R. Co., 54 Misc. 83, 104 N. Y. Supp. 502; Carroll v. Pennsylvania Steel Co., 96 App. Div. 165, 89 N. Y. Supp. 199. Same rule applies since the 1904 amendment of the Code has been declared unconstitutional. Martin's Bank v. Amazonas Co., 98 App. Div. 146, 90 N. Y. Supp. 734. It is held that this rule does not apply to the "Special Term" calendar. Jackson v. Jackson, 44 Misc. 44, 89 N. Y. Supp. 715.

**1687** n. 122. Gegan v. Union Trust Co., 120 App. Div. 382, 105 N. Y. Supp. 243. Right is lost if not asserted when issues first noticed for trial and placed on the calendar. McIntire v. National Nassau Bank, 150 App. Div. 668, 135 N. Y. Supp. 760.

**1688.** Laches in promptly noticing the case for trial after it is at issue is not ground for denying the motion where the action is by a receiver of a corporation and a trial is necessary to enable the receiver to comply with an order of court compelling him to make a final accounting. Schlesinger v. Gilhooly, 111 App. Div. 158, 97 N. Y. Supp. 606.

**1688** n. 124. Cohen v. Thomas, 63 Misc. 378, 116 N. Y. Supp. 725; Koerner v. Kelley, 56 Misc. 605, 107 N. Y. Supp. 538; Meyerson v. Levy, 117 App. Div. 475, 102 N. Y. Supp. 704. Preference cannot thereafter be secured by service of an amended complaint. Gegan v. Union Trust Co., 120 App. Div. 382, 105 N. Y. Supp. 243.

**1688** n. 125a. *Meyerson v. Levy*, 117 App. Div. 475, 102 N. Y. Supp. 704.

## CHAPTER II

### CONSOLIDATION OF ACTIONS

**1690 to 1701.** Where one after the other, a motion made for leave to amend by setting up a counterclaim is denied for laches, defendant sues on the counterclaim, the verdict in the original action is reversed on appeal, defendant moves to amend by setting up the counterclaim and for leave to discontinue the independent action brought by him, the consolidation of the two actions is properly refused. *A. & S. Henry & Co. v. Talcott*, 89 App. Div. 76, 85 N. Y. Supp. 98.

**1692.** It is error to deny motion to consolidate libel actions between same parties based on separate publications relating to a single official act. *Cohalan v. Press Pub. Co.*, 123 App. Div. 487, 107 N. Y. Supp. 962.

**1692** n. 8. This Code provision is now Cons. Laws, c. 40, § 1790.

**1693.** Special proceedings growing out of different facts and against different respondents cannot be consolidated. *People ex rel. Collins v. Ahearn*, 146 App. Div. 135, 130 N. Y. Supp. 497. Properly refused where causes of action are different and parties not the same. *Miller v. Baillard*, 124 App. Div. 555, 108 N. Y. Supp. 973.

**1694.** The motion, made by plaintiff, will not be denied on the ground that the defenses are different, where the defense in the second action is the pendency of the first. *Wilson v. Locke*, 116 App. Div. 421, 101 N. Y. Supp. 831.

**1695** n. 24. See *Goepel v. Robinson Mach. Co.*, 118 App. Div. 160, 103 N. Y. Supp. 5. Not permissible where plaintiff in the one action is defendant in the other and

defendant in the one is plaintiff in the other. *Martin v. Prentice*, 133 App. Div. 741, 118 N. Y. Supp. 215; *Waiontha Knitting Co. v. Hecht & Campe*, 58 Misc. 350, 111 N. Y. Supp. 10.

1695 n. 27. *Philip Hano & Co. v. Gretsche*, 134 N. Y. Supp. 811.

1695 n. 28. Actions should first be removed to Supreme Court and then consolidated, where the judgment prayed for in the action as consolidated exceeds the jurisdiction of the New York City Court. *O'Neill v. Lockwhit Co.*, 82 Misc. 383, 143 N. Y. Supp. 729.

1696. A consolidation is properly refused, after the removal of an action from the municipal to the city court of New York, where it will prejudice the plaintiff in an attempt to enforce bonds given on the removal. *Gray Lithograph Co. v. Schulman*, 84 N. Y. Supp. 503.

1696 n. 29. *Argyle Co. v. Griffith*, 128 App. Div. 262, 112 N. Y. Supp. 773.

1699 n. 44. See *Wilson v. Locke*, 116 App. Div. 421, 101 N. Y. Supp. 831.

1700 n. 52. *Goepel v. Robinson Mach. Co.*, 118 App. Div. 160, 103 N. Y. Supp. 5.

1700 n. 53. But see *Shea v. Oussani*, 133 N. Y. Supp. 1074.

### CHAPTER III

#### SEVERANCE OF ACTIONS

1702 § 1305. In ejectment against landlords and tenants, where the question was whether plaintiffs or landlord defendants were entitled to possession, and the landlords answered claiming a right to possession, plaintiffs were not entitled to a severance and final judgment for possession as against the tenants, who did not answer. *Lewis v. Townsend*, 132 App. Div. 347, 117 N. Y. Supp. 48.

**1703** n. 3. *Electro-Tint Engraving Co. v. American Handkerchief Co.*, 130 App. Div. 561, 115 N. Y. Supp. 34; *Vacuum Cleaner Co. v. Broadway-Cortlandt Co.*, 74 Misc. 482, 132 N. Y. Supp. 335. Code provision does not apply where defendant sets up a counterclaim in excess of plaintiff's claim. *Koehler & Co. v. Adams*, 71 Misc. 436, 128 N. Y. Supp. 707. Severance proper where part of causes of action not denied. *Vacuum Cleaner Co. v. Broadway, etc., Co.*, 74 Misc. 481, 3 Civ. Pro. (N. S.) 88, 132 N. Y. Supp. 335.

**1704** n. 14. *Walsh v. Empire Brick & Supply Co.*, 90 App. Div. 500, 85 N. Y. Supp. 528.

**1706** n. 32. *Seligman v. Friedlander*, 138 App. Div. 784, 123 N. Y. Supp. 583.

**1707** n. 33. See also *Mulligan v. O'Brien*, 119 App. Div. 355, 104 N. Y. Supp. 301. Contra, see *Lane v. Fenn*, 76 Misc. 48, 134 N. Y. Supp. 92.

**1707** n. 34. Plaintiff cannot be allowed to sever two causes of action, where they would have been consolidated, on proper application therefor, if originally made the subject of two actions. *Posner v. Rosenberg*, 153 App. Div. 249, 137 N. Y. Supp. 1084. Under Code, § 1220, causes of action should not be allowed to be severed where, if originally made the subject of two actions, they would have been consolidated, on proper application. *Posner v. Rosenberg*, 153 App. Div. 249, 137 N. Y. Supp. 1084.

**1708** n. 37. *Buckley v. Stansfield*, 155 App. Div. 735, 140 N. Y. Supp. 953.

**1708** n. 43. *Buckley v. Stansfield*, 155 App. Div. 735, 742, 140 N. Y. Supp. 953. If plaintiff's attorney, by mistake enters judgment against one of the defendants "jointly" liable who was also in default, the court may relieve the plaintiff from such mistake by vacating the judgment as to the defendant jointly liable. *Weston v. Citizens' Nat. Bank*, 88 App. Div. 330, 84 N. Y. Supp. 743.

**1709 n. 46.** Provision applies only where liability is several. *Karon v. Eisen*, 128 N. Y. Supp. 137.

**1709 § 1310.** But severance cannot be permitted prior to the decision of a demurrer for misjoinder. *Neun v. Bacon Co.*, 137 App. Div. 397, 121 N. Y. Supp. 397.

**1710.** Where a demurrer for misjoinder of causes of action is undecided, an order cannot be granted permitting plaintiff to divide the action into two actions. *Neun v. Bacon Co.*, 137 App. Div. 397, 121 N. Y. Supp. 718.

## CHAPTER IV

### DEPOSITIONS

**1719 § 1320.** Perpetuating testimony in actions or proceedings involving a question as to title to real property, see Code Civ. Proc., §§ 1688a-f. The person seeking the examination need not be an intended party in his individual capacity but it is sufficient that he expects to soon become an executor and to bring suit as such. *Vibbard v. Kinser Construction Co.*, 66 Misc. 224, 122 N. Y. Supp. 1068.

**1720.** Testimony of third person may be perpetuated. *Matter of Tweedie Trad. Co.*, 105 App. Div. 426, 94 N. Y. Supp. 167.

**1720 n. 25b.** Excepted courts are now within rule by Laws 1909, c. 65, amending Code provision. Corporation is not a "person" who may be examined. *Chartered Bank of India v. North River Ins. Co.*, 136 App. Div. 648, 121 N. Y. Supp. 399.

**1721 § 1323.** Denial of the witness of knowledge as to the subject-matter of the examination is no ground for refusing. *Klaw v. N. Y. Press Co., Limited*, 151 App. Div. 720, 136 N. Y. Supp. 224. Fact the person is assignor of the cause of action sued on is not of itself sufficient ground. *Bernstein v. Solomon*, 140 App. Div. 316, 125 N. Y. Supp. 225.

1721 n. 30. *Vaughan v. Schenker*, 139 App. Div. 15, 123 N. Y. Supp. 535. Order for examination of witness about to leave for the west should not be vacated merely because he states he had a fixed route and his whereabouts could be determined at any time. *Stapleton v. La Shelle*, 124 App. Div. 661, 109 N. Y. Supp. 446. To same effect, *Klaw v. N. Y. Press Co., Limited*, 151 App. Div. 720, 136 N. Y. Supp. 224. An expressed intention of a nonresident to return to the state for the trial is no ground for denying. *Klaw v. N. Y. Press Co., Limited*, 151 App. Div. 720, 136 N. Y. Supp. 224.

1721 n. 31. *Vaughan v. Schenker*, 139 App. Div. 15, 123 N. Y. Supp. 535.

1721 n. 33. Alleging that testimony is necessary to prepare for trial is insufficient. *Jacobsen, Wright & Bogen v. Arnstaedt & Co.*, 129 N. Y. Supp. 452. Order granted on this ground where evidence necessary to furnish bill of particulars required of plaintiff. *Hill v. Bloomingdale*, 136 App. Div. 651, 121 N. Y. Supp. 370, 2 Civ. Pro. (N. S.) 40. Examination on this ground should be sparingly granted and only where necessary to prevent a failure of justice. *Hill v. Bloomingdale*, 136 App. Div. 651, 121 N. Y. Supp. 370, 2 Civ. Pro. (N. S.) 40. Whether "special circumstances" exist in any case depends on the facts of that particular case. *Chartered Bank of India v. North River Ins. Co.*, 136 App. Div. 646, 121 N. Y. Supp. 399. Where it distinctly appears that it is essential that the deposition of a witness not a party to the action is material and necessary to enable a party to furnish a bill of particulars which the court has ordered her to furnish, there are "special circumstances" which render it proper that the party should have the right to take the deposition of a person either a party or who is not a party, so that he can comply with the order of the court and furnish particulars which the court has ordered as essential to the protection of the adverse party. *Chittenden v. San Domingo Improvement Co.*, 132 App.



Div. 869, 116 N. Y. Supp. 829. Witness hostile, coupled with other circumstances, as ground, see *Automobile Club of America v. Canavan*, 128 App. Div. 426, 112 N. Y. Supp. 785.

1721 n. 33c. *American Woolen Co. v. Altkrug*, 139 App. Div. 671, 124 N. Y. Supp. 203.

1722 n. 33d. In commenting on this Code subdivision, Laughlin, J., in *Hebron v. Work*, 101 App. Div. 463, 92 N. Y. Supp. 149, remarks as follows: "These sections should be revised to harmonize with the changes made in the law by the Legislature and to conform clearly to the construction placed thereon by the courts, to the end that new beginners may not be obliged to devote days of study to ascertain the correct practice in obtaining the examination of a party or a witness, and that the old practitioners and the courts may not be misled when required to act without much time for examination or reflection."

1723. An affidavit by plaintiff's attorney is insufficient where based on information and belief as to the facts, where no reason is shown why the affidavit of the proposed witness was not produced. *Vincent v. Kilmer*, 107 App. Div. 499, 95 N. Y. Supp. 343. It is not necessary to expressly state that the applicant intends to read, on the trial, the testimony taken. *Jacobs v. Mexican Sugar Refining Co.*, 45 Misc. 56, 90 N. Y. Supp. 824. The amendment of this Code provision in 1913 (c. 278) adds to the words that, "if the party sought to be examined is a corporation," the words "joint-stock or other unincorporated association," and also that the affidavit shall state the name of the officers or directors, "or managing agents thereof."

1723 n. 37. *Jacobs v. Mexican Sugar Refining Co.*, 45 Misc. 56, 90 N. Y. Supp. 824.

1723 n. 38. Testimony must be material. *Gould v. Gould*, 125 App. Div. 375, 109 N. Y. Supp. 910. As to subd. 3 it is sufficient to refer to the pleadings made a part

of the affidavit. *Continental Securities Co. v. Belmont*, 147 App. Div. 118, 131 N. Y. Supp. 713.

**1724** n. 40a. An affidavit not stating place of business of expected adverse parties nor that they are of full age nor show that a cause of action exists nor necessity for perpetuating the testimony is insufficient. *Matter of Cohen*, 53 Misc. 400, 104 N. Y. Supp. 1027.

**1726** § 1326. Order should not be vacated on technical grounds after deposition is taken and the death of the witness. *Clark v. Phillips*, 65 Misc. 166, 119 N. Y. Supp. 360.

**1727** § 1327. 1911 Code amendment, see post, **1815** n. 583.

**1727** n. 52. *Miners & Merchants' Bank v. Ardsley Hall Co.*, 113 App. Div. 194, 99 N. Y. Supp. 98; *Meres v. Emmons*, 103 App. Div. 381, 92 N. Y. Supp. 1099. The Code exception to this rule where the deposition is "that of a party taken at the instance of an adverse party" applies to a deposition taken by a coparty, where their interests are hostile. *Hetzel v. Easterly*, 96 App. Div. 517, 533, 89 N. Y. Supp. 154.

**1730** § 1332. To take testimony in Germany, letters rogatory should be issued rather than a commission. *Matter of Smith*, 79 Misc. 77, 139 N. Y. Supp. 522. Materiality of interrogatories proposed will not be considered on the application. *Matter of Smith*, 79 Misc. 77, 139 N. Y. Supp. 522. No ground for refusing letters rogatory to obtain the testimony of a German that some of the interrogatories may relate to matters not evidentiary under the *lex fori*. *Matter of Smith*, 79 Misc. 77, 139 N. Y. Supp. 522.

**1730** n. 62. See *Decanville Automobile Co. v. Metropolitan Bank*, 124 App. Div. 478, 108 N. Y. Supp. 1027 [citing 2 *Nichols' New York Pr.*, § 1332].

**1733** n. 69a. A commission will not be awarded to take testimony material to a motion to punish for contempt on which no issues have been joined. *Gardner v. Roycrofters*, 103 N. Y. Supp. 637.

**1733 n. 70.** *Deery v. Byrne*, 120 App. Div. 6, 104 N. Y. Supp. 836.

**1733 n. 73.** *Oakes v. Riter*, 118 App. Div. 772, 103 N. Y. Supp. 849.

**1734 § 1338.** Competency of the evidence will not be considered. *Trowbridge v. Townsend*, 79 Misc. 65, 140 N. Y. Supp. 503. All that is necessary to appear is that the action is mentioned in section 888 of the Code and that the testimony of one or more witnesses not within the state is material to the applicant. *Oakes v. Riter*, 118 App. Div. 772, 103 N. Y. Supp. 849. The motion will not be denied because the witnesses may refuse to answer on the ground that the evidence is in the nature of confidential communications. *Cullinan v. Dwight*, 51 Misc. 221, 100 N. Y. Supp. 896.

**1734 n. 85.** Express statement not necessary where equivalent statement made. *Estrick v. Kobbe*, 84 Misc. 39, 145 N. Y. Supp. 952. *Downing v. McKillop, Walker & Co.*, 117 N. Y. Supp. 961. But the exact place of his residence need not be stated. *Dambmann v. Metropolitan St. R. Co.*, 110 App. Div. 165, 97 N. Y. Supp. 91; *Tirpak v. Hoe*, 53 Misc. 532, 103 N. Y. Supp. 795. Affidavit on information and belief without stating sources of information is insufficient. *Fox v. Peacock*, 97 App. Div. 500, 90 N. Y. Supp. 137.

**1735 n. 89.** *Moriata v. Raymond*, 54 Misc. 271, 105 N. Y. Supp. 973. Facts and not conclusion must be stated. *Lowther v. Sullivan*, 107 N. Y. Supp. 198. Testimony sought must be shown to be material to the issue. *Schuler v. Woodward*, 137 App. Div. 576, 122 N. Y. Supp. 404.

**1735 n. 97.** If made by attorney, the reason why it was not made by the party must be stated. *Lowther v. Sullivan*, 107 N. Y. Supp. 198. It is not sufficient to aver that the party is a nonresident. *Fox v. Peacock*, 97 App. Div. 500,

90 N. Y. Supp. 137; *Tirpak v. Hoe*, 53 Misc. 532, 103 N. Y. Supp. 795; *Downing v. McKillop, Walker & Co.*, 117 N. Y. Supp. 961.

**1735 n. 98.** The statement in the text that "the application for a commission may be made at any time within twenty days after the joinder of issue" is misleading in so far as the present practice is concerned. By the Code (§§ 888, 908), the application may be made before joinder of issue or even after judgment, in some cases. "There can be no question but that the court has power to issue a commission at any time before the case is finally decided," where the application is made after the joinder of an issue of fact, to obtain material testimony in the prosecution or defense of the action. *Mercantile Nat. Bank v. Sire*, 100 App. Div. 459, 91 N. Y. Supp. 418.

**1735 n. 99.** *Valentine v. Rose*, 45 Misc. 342, 90 N. Y. Supp. 389. See *Roth v. Mautner*, 115 App. Div. 148, 100 N. Y. Supp. 707; *Tirpak v. Hoe*, 53 Misc. 532, 103 N. Y. Supp. 795. Contra, see *Zeggio v. Robinson*, 153 App. Div. 886, 137 N. Y. Supp. 1104.

**1736 n. 109.** Denial of previous motion for an open commission is not ground for refusal. *Harden v. Hoops*, 137 App. Div. 299, 121 N. Y. Supp. 1086.

**1737 § 1339.** Should not be denied on the ground that the interrogatories will elicit confidential communications. *Harden v. Hoops*, 137 App. Div. 299, 121 N. Y. Supp. 1086. No ground for refusing that other evidence of the same facts is available. *Trowbridge v. Townsend*, 79 Misc. 65, 140 N. Y. Supp. 503.

**1738 n. 111.** Not issue to obtain inadmissible evidence. *Dwight v. Gibb*, No. 1, 145 App. Div. 223, 129 N. Y. Supp. 961.

**1738 § 1340.** Unless the applicant has been guilty of laches or bad faith, it is customary to grant a reasonable stay with the order for a commission. *Roth v. Mautner*,

115 App. Div. 148, 100 N. Y. Supp. 707. See also *infra*, 1803, § 1392.

1739 n. 119. *Fisher v. South Shore Traction Co.*, 70 Misc. 529, 127 N. Y. Supp. 333.

1739 n. 122. Bond to secure plaintiff's possible recovery. *Brundage v. Marshall*, 134 N. Y. Supp. 592.

1739 n. 126. See *Roth v. Mautner*, 115 App. Div. 148, 100 N. Y. Supp. 707.

1740 § 1341. Production of letters and documents held improper. Order modified so as to require attaching copy of material parts thereof, on condition that party produce at trial complete documents or copy thereof. *Herbst v. Keystone Driller Co.*, 158 App. Div. 503, 143 N. Y. Supp. 748. The order setting interrogatories cannot be vacated by motion at Special Term. *J. J. Spurr & Sons v. Empire State Surety Co.*, 122 App. Div. 449, 106 N. Y. Supp. 1009.

1741 n. 135. The justice under whom the interrogatories are settled has no power to pass on objections to them. *J. J. Spurr & Sons v. Empire State Surety Co.*, 122 App. Div. 449, 106 N. Y. Supp. 1009. The *Wanamaker* case is reversed in 168 N. Y. 125. Compare *infra*, 1742 nn. 239, 240.

1742. It is no ground for disallowing cross interrogatories that the party has taken out an independent commission to examine the same witness. *Irving v. Royal Exch. Assurance*, 122 App. Div. 56, 107 N. Y. Supp. 83.

1742 n. 139. Relevancy is equivalent of pertinency. *Matter of Smith*, 80 Misc. 628, 142 N. Y. Supp. 151. The proposer of the question, when challenged by an objection of impertinency, must show pertinency. *Matter of Hernandez*, 158 App. Div. 815, 144 N. Y. Supp. 150; *Zeggio v. Robinson*, 155 App. Div. 893, 139 N. Y. Supp. 1070. Where interrogatories are allowed which are clearly irrelevant and are for some ulterior or improper purpose, the court on appeal may disallow them; but the court should be liberal in allowing

interrogatories and they should stand unless it is clear that they cannot be material. *Shafer v. McIntyre*, 116 App. Div. 87, 101 N. Y. Supp. 268.

**1742** n. 140. *Irving v. Royal Exch. Assurance*, 122 App. Div. 56, 107 N. Y. Supp. 83. Competency or materiality should not be determined. *Matter of Smith*, 80 Misc. 628, 142 N. Y. Supp. 151. Mass of questions totally irrelevant should not be allowed. *American Institute v. Randolph*, 141 N. Y. Supp. 949.

**1744**. If commission was not issued by or signed or sealed by the court, no motion to suppress the deposition is necessary. The testimony cannot be received in evidence. *Lamchick v. Ackerman*, 130 N. Y. Supp. 144.

**1744** n. 153. *Harden v. Hoops*, 137 App. Div. 299, 121 N. Y. Supp. 1086.

**1745** n. 160. *Spurr & Sons v. Empire State Surety Co.*, 117 App. Div. 816, 102 N. Y. Supp. 1065.

**1749** § 1344. Witnesses sought to be examined must be outside the state. *Sullivan v. Taintor Mfg. Co.*, 144 App. Div. 797, 129 N. Y. Supp. 598. Oral commission will be granted, in the exercise of discretion, where witnesses are in an adjoining state. *Trowbridge v. Townsend*, 79 Misc. 65, 140 N. Y. Supp. 503. Where witness to be examined on behalf of plaintiffs is a coplaintiff, open commission should not be ordered except on consent of all parties. *Stuart v. Spofford*, 122 App. Div. 47, 106 N. Y. Supp. 903. Open commission will not issue merely because of disability to frame cross-interrogatories but new commission may be thereafter applied for to orally cross-examine witness. *Stapleton v. La Shelle*, 124 App. Div. 333, 109 N. Y. Supp. 41. Where commission on written interrogatories would fully answer the ends of justice, open commission issued on condition plaintiff pay in advance the reasonable expense to which defendants would be put thereby. *Deery v. Byrne*, 120 App. Div. 6, 104 N. Y. Supp. 836.

**1749** n. 169. May be in actions for the ascertainment and payment of claims against estates. *Deery v. Byrne*, 120 App. Div. 6, 104 N. Y. Supp. 836.

**1750** n. 176. *Depue v. Depue*, 115 App. Div. 466, 101 N. Y. Supp. 412; *Ordway v. Radigan*, 114 App. Div. 538, 100 N. Y. Supp. 121. See *Cullinan v. Dwight*, 51 Misc. 221, 100 N. Y. Supp. 896. The reasons why an "oral" examination is necessary must be shown by affidavits. *Woodward v. Skinner*, 92 N. Y. Supp. 259.

**1752** § 1345. Order should be conditioned on payment of a reasonable sum for counsel fees and expenses connected therewith. *Reed v. Fenn*, 138 App. Div. 417, 122 N. Y. Supp. 938. In *Gowans v. Jobbins*, 91 N. Y. Supp. 842, the order was required to provide that the actual expenses incurred by one of the attorneys for the plaintiffs in attending the examinations before the commissioners of the witnesses produced on behalf of the defendant be paid by the defendant, and also a per diem allowance, not exceeding \$20, for the time such attorney is necessarily absent from home, attending such examinations. Said expenses and allowances to be taxed before a justice of the Supreme Court on three days' notice. The payment thereof to be made within 10 days after said taxation. The defendant to deposit, as designated in the order, a sufficient sum, stated therein, to cover the expenses and allowance to such attorney, or to give satisfactory security therefor, within 10 days after service of a copy of the order, together with the notice of entry thereof. In lieu of the examination of said witnesses by open commission, the defendant was permitted, at her election, made within 20 days thereof, to examine said witnesses on written interrogatories to be annexed to the commissions to be issued, conforming to the practice prescribed in such cases. For order held too broad and unrestricted, see *Chas-kin v. Mackay*, 130 App. Div. 50, 114 N. Y. Supp. 457.

**1753** § 1346. Time of notice cannot be shortened, the

ruling being the same whether the commission is open or not. *Reed v. Fenn*, 138 App. Div. 417, 122 N. Y. Supp. 938.

**1755** § 1352. Objection to taking of deposition at place other than that named may be waived. *DeCauville Automobile Co. v. Metropolitan Bank*, 124 App. Div. 478, 108 N. Y. Supp. 1027.

**1758** n. 223. Compare *DeCauville Automobile Co. v. Metropolitan Bank*, 124 App. Div. 478, 108 N. Y. Supp. 1027.

**1762**. That interrogatories contain erroneous recitals is not ground. *Bowen v. Havana Electric Ry. Co.*, 146 App. Div. 672, 131 N. Y. Supp. 536. Refusal of witness to give material testimony called for by proper cross interrogatories is not ground where such interrogatories did not relate to matters covered by the direct interrogatories. *Bowen v. Havana Electric Ry. Co.*, 146 App. Div. 672, 131 N. Y. Supp. 536. That order for commission issued to the consul general at Paris does not mention his name is not ground. *Bowen v. Havana Electric Ry. Co.*, 146 App. Div. 672, 131 N. Y. Supp. 536. Interest and bias disclosed by a witness does not tend to show unfair execution of the commission. *Bowen v. Havana Electric Ry. Co.*, 146 App. Div. 672, 131 N. Y. Supp. 536. Commission held not unfairly executed because one party not represented by attorney. *Bowen v. Havana Electric Ry. Co.*, 146 App. Div. 672, 131 N. Y. Supp. 536. Refusal, on cross-examination, to answer entirely immaterial questions, where due to no act of the party who calls the witness, is not ground for suppressing the entire deposition. *Calhoun v. Commonwealth Trust Co.*, 124 App. Div. 633, 109 N. Y. Supp. 77.

**1762** n. 263. *Calhoun v. Commonwealth Trust Co.*, 124 App. Div. 633, 109 N. Y. Supp. 77.

**1763**. Leave given moving party to apply for letters rogatory. *Bowen v. Havana Electric Ry. Co.*, 146 App. Div. 672, 131 N. Y. Supp. 536.



**1763** n. 267. Motion may be made before trial. *Calhoun v. Commonwealth Trust Co.*, 124 App. Div. 633, 109 N. Y. Supp. 77.

**1763** § 1359. Where the commissioner's certificate is not attached and he did not subscribe his name to each exhibit and each half sheet, the party on whose behalf the deposition was taken should be allowed, on a motion to suppress, to return it to the commissioner for amendment. *Risley v. Harlow*, 48 Misc. 277, 96 N. Y. Supp. 728.

**1764**. Return for further examination where no written interrogatories, see *Smith v. Star Co.*, 132 App. Div. 916, 116 N. Y. Supp. 730.

**1764** § 1360. Depositions taken in a foreign country are entitled to the same weight as if taken here. *Foran v. Royal Bank of Canada*, 141 App. Div. 548, 126 N. Y. Supp. 575.

**1764** n. 278. Under this Code provision, where the party taking the deposition reads the testimony taken on the direct examination, but the other party refuses to read the testimony taken on the cross-examination whereupon it is read by the former, the latter may object to any question as irrelevant or incompetent though a part of his own cross-examination. *Cudlip v. New York Evening Journal Pub. Co.*, 180 N. Y. 85, 72 N. E. 1141.

**1765** n. 279. See also *Clifford v. Denver & R. G. R. Co.*, 111 App. Div. 513, 97 N. Y. Supp. 707.

**1767** n. 300. *Cudlip v. New York Evening Journal Pub. Co.*, 180 N. Y. 85, 72 N. E. 1141; *Matter of Van Ness*, 78 Misc. 592, 139 N. Y. Supp. 485.

**1767** § 1362. The fact that the adverse party has declined to read the answers does not warrant excluding the cross-examination. *Schnabel v. American Education Alliance*, 79 Misc. 624, 140 N. Y. Supp. 369.

**1768** n. 303. This is so even where one reads a deposition taken by the opposing party, at least where the objection

is to all the cross-examination on the theory that the party has made the witness his own witness. *Kalkhoff Co. v. St. Nicholas Church*, 67 Misc. 107, 121 N. Y. Supp. 713.

1772 n. 325. See also *Matter of Great Northern Const. Co.*, 50 Misc. 467, 100 N. Y. Supp. 564.

1772 n. 328. Will not issue where reply was necessary to join issue, but none was filed. *Matter of Isaacs*, 148 App. Div. 157, 132 N. Y. Supp. 1023.

1773 n. 331. A second subpoena will not, it seems, be vacated on the ground that it was irregular to issue it without notice to all the opposing parties, since such question may be raised in the court of the state in which the action is pending. *Matter of Shawmut Min. Co.*, 94 App. Div. 156, 87 N. Y. Supp. 1059. The subpoena should be vacated where the court from which the commission issued was without jurisdiction. *Matter of Great Northern Const. Co.*, 50 Misc. 467, 100 N. Y. Supp. 564.

1774. That attorney need not, on his examination, disclose the names of his clients, see *Matter of Shawmut Min. Co.*, 94 App. Div. 156, 87 N. Y. Supp. 1059.

1774 n. 334. Merits of action will not be passed on, on motion to direct a witness to answer certain interrogatories. *Hyde v. Scott*, 75 Misc. 487, 133 N. Y. Supp. 904.

1775 § 1374. Narrow and technical construction of statute not allowable to prevent examination. *New York Assets R. Co. v. Pforzheimer*, 158 App. Div. 700, 143 N. Y. Supp. 698. Only party can move. *Bradley v. Bradley*, 137 App. Div. 751, 122 N. Y. Supp. 626.

1775 n. 341. The city courts of record excepted from the statute are omitted by the amendment by Laws 1909, c. 65, and hence the Code provision now applies to such courts except as affected by special statutes.

1775 § 1375. The assignor of plaintiff cannot be examined. *Bernstein v. Solomon*, 140 App. Div. 316, 125 N. Y. Supp. 225. Corporation not a party cannot be examined. *Chart-*

ered Bank of India v. North River Ins. Co., 136 App. Div. 646, 121 N. Y. Supp. 399. Foreign corporation may be examined. Bluthenthal & Bickart, Inc., v. Crowley, No. 2, 138 App. Div. 845, 123 N. Y. Supp. 520. Right to examine officers of city, in action against city, see Uvalde Asphalt Paving Co. v. New York, 149 App. Div. 491, 134 N. Y. Supp. 50.

**1776** n. 348. Wood v. J. L. Mott Iron Works, 114 App. Div. 108, 99 N. Y. Supp. 677. It is the corporation, however, which is to be examined through its officers, and not its officers as such. Shumaker v. Doubleday, Page & Co., 116 App. Div. 302, 101 N. Y. Supp. 587. There is no authority to examine an officer of a corporation as such, apart from the examination of the corporation. Jacobs v. Mexican Sugar Refining Co., 112 App. Div. 657, 98 N. Y. Supp. 542; Meade v. Southern Tier Masonic Relief Ass'n, 119 App. Div. 761, 104 N. Y. Supp. 523. Compare Donaldson v. Brooklyn Heights R. Co., 119 App. Div. 513, 104 N. Y. Supp. 178. "It is well settled that there is no authority for the examination of an officer of a corporation as such apart from the examination of the corporation itself." Herrman v. Tapley Co., 64 Misc. 466, 118 N. Y. Supp. 803. Order for examination of corporation through officer is entirely different from examination of officer of corporation as a witness. Searle v. Halstead & Co., 139 App. Div. 134, 123 N. Y. Supp. 984. Corporation cannot be examined through a person who has ceased to be an officer. Chartered Bank of India v. North River Ins. Co., 136 App. Div. 646, 121 N. Y. Supp. 399. Officers of corporation may be examined before trial as to matters of defense, although occurring before the formation of the corporation, since their prior personal knowledge is imputed to the corporation. New York Assets R. Co. v. Pforzheimer, 158 App. Div. 700, 143 N. Y. Supp. 898. In action on a contract against a corporation, examination of officer to show authority of officer to

make contract is proper, but may be limited to examination of one officer. *Chapman v. Read*, 149 App. Div. 52, 133 N. Y. Supp. 625.

**1777.** Party to be examined must have personal knowledge of the facts. *Esterson v. Whitman*, 132 N. Y. Supp. 303.

**1777 n. 351.** That defendants are in another state is immaterial. *Heller, Hirsch & Co. v. General Mfg. Co.*, 155 App. Div. 211, 140 N. Y. Supp. 117.

**1777 n. 352.** Followed in *Gilroy v. Interborough-Metropolitan Co.*, 55 Misc. 32, 106 N. Y. Supp. 171.

**1778 § 1377.** The late cases establish a more liberal practice in regard to allowing an examination and hold that bad faith alone can defeat the right to an examination of a party before trial where the requirements of the Code and the general rules of practice are complied with. *Tirpak v. Hoe*, 53 Misc. 535, 103 N. Y. Supp. 798; *Shonts v. Thomas*, 116 App. Div. 854, 102 N. Y. Supp. 324. In the first department the granting of the order, in the absence of bad faith or abuse of process, seems now to be almost a matter of course. *Goldmark v. United States Electro-Galvanizing Co.*, 111 App. Div. 526, 97 N. Y. Supp. 1078; *McKeand v. Locke*, 115 App. Div. 174, 100 N. Y. Supp. 704; *Hill v. McKane*, 115 App. Div. 537, 101 N. Y. Supp. 411; *Grant v. Greene*, 118 App. Div. 850, 103 N. Y. Supp. 674; *Ehrich v. Winter & Co.*, 52 Misc. 641, 103 N. Y. Supp. 1023; *Loewy v. Gordon*, 129 App. Div. 459, 114 N. Y. Supp. 211. A general examination of the defendants in the action may be had at any time, and is not limited to an affirmative cause of action or an affirmative defense set forth in favor of the party desiring that examination. *Strodl v. Farish-Stafford Co.*, 116 N. Y. Supp. 570.

**1778 n. 362.** *Bender v. Bork*, 52 Misc. 295, 102 N. Y. Supp. 152.

**1779 n. 366.** But not where no cause of action is shown.

*Boskowitz v. Sulzbacher*, 121 App. Div. 878, 106 N. Y. Supp. 865.

**1779 § 1378.** It is extremely difficult to deduce general rules from the later cases or, in some instances, to harmonize them. Generally an examination not limited to petitioner's affirmative case is not granted. *Ketcham v. Rowland & Shafto*, 71 Misc. 439, 128 N. Y. Supp. 695. Thus, defendant cannot ordinarily obtain an examination of plaintiff as to matters which must first be established by the latter to prove his cause of action. *Siede v. Newkirk*, 148 App. Div. 864, 133 N. Y. Supp. 623. An order for plaintiff's examination, where merely for the purpose of cross-examining him as to facts which he is under the burden of proving to establish his case, is improper. *Lawson v. Hotchkiss*, 140 App. Div. 297, 125 N. Y. Supp. 261. While the power exists to order an examination of a party as to his own case, it is rarely exercised; but where there are extraordinary and peculiar circumstances plaintiff may be examined before trial to establish a defense, as where the only witness by which defendant could establish his defense has died. *Alden v. O'Brien*, 138 App. Div. 249, 122 N. Y. Supp. 910. An examination of an assignor of plaintiff merely to show that plaintiff cannot establish a cause of action is not proper. *Bernstein v. Solomon*, 140 App. Div. 316, 125 N. Y. Supp. 225. Not allowed to find out the evidence of the opposing party and to prepare evidence to meet it. *Segschneider v. Waring Hat Mfg. Co.*, 134 App. Div. 217, 118 N. Y. Supp. 1000. Should be refused where apparent purpose is merely to get plaintiff's story and break it down by cross-examination. *McClarty v. Giroux*, 142 App. Div. 750, 127 N. Y. Supp. 724. Cannot examine plaintiff before trial merely to obtain his story in advance. *Smyth v. Lichtenstein*, No. 1, 137 App. Div. 310, 122 N. Y. Supp. 73; *Reusens v. Arkenburgh*, 136 App. Div. 653, 121 N. Y. Supp. 353; *Segschneider v. Waring Hat Mfg. Co.*, 134 App. Div. 217, 118 N. Y. Supp. 1000. Not ground

that examination is required to enable the moving party to find out what evidence is necessary to support the denials in his answer. *Kerr v. Hammond*, 153 App. Div. 681, 138 N. Y. Supp. 619. Plaintiff's examination may be ordered as to an affirmative defense. *Zeitz v. Cook*, 157 App. Div. 940, 142 N. Y. Supp. 1151; *Wallenstein v. Desser*, 134 N. Y. Supp. 626. Thus, a defendant who is pleading lack of consideration is entitled to examine plaintiff to prove such defense. *Meredith v. Dodd*, 160 App. Div. 917, 145 N. Y. Supp. 662. But where answer does not raise an issue, plaintiff cannot be ordered to be examined in regard thereto. *Connors v. Collier*, 65 Misc. 169, 119 N. Y. Supp. 513. Ordinarily, an order for defendant's examination as to matters of defense, not material and necessary to plaintiff's cause of action, is improper. *Ernst v. Levi*, 148 App. Div. 280, 132 N. Y. Supp. 11. Cannot examine defendant merely for purpose of ascertaining matters which belong exclusively to the defense. *People v. Natural Carbonic Gas Co.*, 140 App. Div. 802, 125 N. Y. Supp. 610. It is only in rare and exceptional cases that the court will permit an examination of a defendant to "avoid" an affirmative defense. *Herzig v. Washington Fire Ins. Co.*, 144 App. Div. 174, 128 N. Y. Supp. 988. On the other hand, it has been held as follows: "Where a defense has been set up which, if established and unanswered, would destroy the cause of action, if the plaintiff in his moving papers shows that he desires an examination of the defendant, not for the purpose of disclosing that defense which has already been disclosed by the answer, but to avoid it, then such evidence is material and necessary to the plaintiff's cause of action, because without it that cause would be gone. Under such circumstances an examination may be had." *Schweinburg v. Altman*, 131 App. Div. 795, 116 N. Y. Supp. 318; *People v. Natural Carbonic Gas Co.*, 140 App. Div. 802, 805, 125 N. Y. Supp. 610. In action to restrain further negotiation of a note, defendant may be ordered to be examined

as to facts material to plaintiff's affirmative case although it may also be used as a defense to a counterclaim. *Peterson v. Fowler*, 143 App. Div. 282, 128 N. Y. Supp. 505. Where defendant denies ownership and operation of automobile causing the injuries, he may be examined in regard thereto. *Straus v. Peck*, 126 N. Y. Supp. 628. May examine defendant to establish plaintiff's case, where defendant is charged with violation of fiduciary duties which he alone can explain. *Beer Importing Co. v. Boross*, 136 App. Div. 649, 121 N. Y. Supp. 342. Order for defendant's examination granted when otherwise it might result in plaintiff losing his claim because of inability to come from England to testify. *Lyon v. Gloeckner*, 80 Misc. 642, 141 N. Y. Supp. 851. Order for examination of defendant as to his financial condition should not be granted where only object is to harass and annoy him. *Berger v. Herbert*, 81 Misc. 360, 142 N. Y. Supp. 2. In libel suit against a corporation and individual defendants, where the printing and publication is denied, an order is proper for the examination of the individual defendants to connect them with the publication. *Mason v. New York Review Pub. Co.*, 154 App. Div. 651, 139 N. Y. Supp. 639. Examination of person against whom an action is about to be brought can be had only for the purpose of framing the complaint. *Matter of Sloboder*, 74 Misc. 198, 131 N. Y. Supp. 1003. In the first department, a proposed plaintiff should not be granted an order to discover who is liable on a cause of action shown to exist. *Matter of Moto Bloc Import. Co.*, No. 1, 140 App. Div. 532, 125 N. Y. Supp. 427. Not granted to frame complaint where moving papers show knowledge sufficient therefor. *Thompson v. Haigh*, 134 App. Div. 614, 119 N. Y. Supp. 331; *White v. Improved Property, etc., Co.*, 134 App. Div. 948, 118 N. Y. Supp. 1057. If application is to enable plaintiff to frame a complaint, each case must be determined by its own facts. *Mendelson v. Newborg*, 155 App. Div. 892, 139 N. Y. Supp. 1052. No examination, in

such a case, unless shown to be necessary. *Wallace v. People's Gas & E. Co.*, 155 App. Div. 946, 140 N. Y. Supp. 1150. Order for examination of plaintiff, to enable defendant to plead, is improper where the moving papers show defendant has sufficient knowledge to enable him to plead. *Loughlin v. Wocker*, 146 App. Div. 434, 131 N. Y. Supp. 176. Where the examination is sought merely to enable defendant to frame an answer, and the moving papers clearly show the examination of plaintiff is not necessary for that purpose, the motion should be denied. *Waitzfelder v. A. Moses Sons & Co.*, 120 App. Div. 144, 104 N. Y. Supp. 796. An order for examination before service of the complaint will be granted only where necessary to enable plaintiff to frame his complaint. *Fischer v. American Exch. Nat. Bank*, 128 App. Div. 268, 112 N. Y. Supp. 668. Where moving papers show prospective plaintiff is fully advised as to all the facts necessary to enable him to frame his complaint, the motion to examine the prospective defendant will be denied. *Matter of Sloboder*, 74 Misc. 198, 131 N. Y. Supp. 1003; *In re La Grave*, 132 App. Div. 108, 116 N. Y. Supp. 465; *In re Gardner*, 124 App. Div. 654, 109 N. Y. Supp. 95. If the evidence is inadmissible an examination in regard thereto should be refused. *Oakes v. Star Co.*, 119 App. Div. 358, 104 N. Y. Supp. 244. No examination of defendant is necessary to frame a complaint for an accounting. *Pierce v. McLaughlin Real Estate Co.*, 121 App. Div. 501, 106 N. Y. Supp. 28. Plaintiff cannot obtain an order for examination of defendant before trial in regard to the matters set up in his separate defense. *Caldwell v. Glazier*, 128 App. Div. 315, 112 N. Y. Supp. 655. An order for examination of defendant to frame complaint will not be granted to enable plaintiff to allege the exact amount due. *Brick v. Shaff*, 128 App. Div. 264, 112 N. Y. Supp. 642; *Cohn v. Hubert*, 140 App. Div. 507, 125 N. Y. Supp. 834. An examination of plaintiff by defendant before trial to obtain the items and details of dam-



ages, in action for breach of contract, will not be ordered. *Hartog & Beinhauer Candy Co. v. Richmond Cedar Works*, 124 App. Div. 627, 109 N. Y. Supp. 113. Where defendants admit the existence of the contract sued on but deny that it is correctly set forth by plaintiff, an order permitting an examination to find out what the actual contract was is properly granted. *Anderson v. Lisman*, 130 App. Div. 134, 114 N. Y. Supp. 348. Order for examination of defendant as to his defense of false representations is improper where unnecessary. *Weeks v. Whitney*, 146 App. Div. 621, 131 N. Y. Supp. 408. Proper, in suit to set aside deed executed as a mortgage, to enable plaintiff to ascertain whether the note was paid. *Williams v. Snowman*, 142 N. Y. Supp. 225. Examination of plaintiff, a physician suing for medical services, is properly ordered as to defense of malpractice. *Storer v. Harris*, 141 N. Y. Supp. 897. Defendant is entitled to examine plaintiff in breach of promise suit to establish facts alleged in the defense. *Poole v. Meass*, 144 App. Div. 155, 128 N. Y. Supp. 751. In action on building contract, see *Tisdale Lumber Co. v. Droge*, 147 App. Div. 55, 131 N. Y. Supp. 683. As a condition precedent to the application for the order, the applicants are not required to request the defendant's company for a copy of the records and papers desired. *Jacobs v. Mexican Sugar Refining Co.*, 112 App. Div. 655, 98 N. Y. Supp. 541. Where the information sought would be useless to the moving party, the examination will be refused. *Hinds, Noble & Eldredge v. Bonner*, 52 Misc. 461, 102 N. Y. Supp. 484. Where the cause of action is in equity for an accounting it is unnecessary to examine one of the defendants before trial to ascertain the condition of the account. *Louda v. Revillon*, 99 App. Div. 431, 91 N. Y. Supp. 194. Order to examine to show prostitution of defendant granted in action to enjoin defendant from holding herself out as plaintiff's wife, as against objection that the matters as to which the examination was sought were irrel-

evant and immaterial to the issues in the action. *Bell v. Clarke*, 45 Misc. 272, 92 N. Y. Supp. 163. In divorce suit, see *Haff v. Haff*, 132 App. Div. 338, 116 N. Y. Supp. 1100. Necessity for examination in suit to enjoin depriving plaintiff of use of a trade name and for an accounting, see *Solar Baking Powder Co. v. Royal Baking Powder Co.*, 128 App. Div. 550, 112 N. Y. Supp. 1013.

1779 n. 367. Should not be refused because facts may be proved by other witnesses. *Kaminer v. West Side Warehouse Co.*, 72 Misc. 356, 130 N. Y. 138; *Niehoff v. Star Co.*, 134 App. Div. 473, 119 N. Y. Supp. 247. *Cherbuliez v. Parsons*, 123 App. Div. 814, 108 N. Y. Supp. 321. That information could be obtained from some other witness is not ground for refusing. *Sufrin v. Rhine Realty & Imp. Co.*, 153 App. Div. 887, 138 N. Y. Supp. 382. "Nor is it an answer to such an application that the party making it can procure the evidence from other persons than the person whose deposition is required." *Mithertz v. Goldschmidt Bros. Co.*, 64 Misc. 460, 119 N. Y. Supp. 610, 612. No ground for refusing that testimony can be obtained from other sources. *Plohn v. Columbia Amusement Co.*, 76 Misc. 252, 134 N. Y. Supp. 947. "It is not an answer to such an application to say that the party making the application can subpoena the witness sought to be examined on the trial, nor a stipulation by a witness or a defendant that such a witness or defendant would appear for trial and answer to such an application." *Mithertz v. Goldschmidt Bros. Co.*, 64 Misc. 460, 118 N. Y. Supp. 610, 612. No objection that moving party has personal knowledge or has other evidence on the question in issue. *Richards v. Whiting*, 127 App. Div. 208, 111 N. Y. Supp. 21. In an action for an accounting, the fact that a trial of the issues prior to the interlocutory judgment will result in disclosing to the court all of the facts necessary for a final judgment is not a reason for refusing to allow an examination of the defendant as to

all matters material on the trial of such issues. *Griffen v. Davis*, 99 App. Div. 65, 90 N. Y. Supp. 491. The fact that the information might have been obtained by a bill of particulars is no defense. *Tirpak v. Hoe*, 53 Misc. 535, 103 N. Y. Supp. 795. The fact that the party can procure the required evidence from other persons is no defense. *Turck v. Chisholm*, 53 Misc. 110, 103 N. Y. Supp. 1095. A mere allegation that the movant is as fully acquainted with the facts as the party sought to be examined, where controverted and not supported by the surrounding circumstances, is no defense. *Id.*

1780 n. 370. See also *Lewis v. Buffalo*, 115 App. Div. 735, 100 N. Y. Supp. 1052. To contrary effect, see *Tisdale Lumber Co. v. Droge*, 147 App. Div. 55, 131 N. Y. Supp. 683. An examination to ascertain facts which may be found in public statutes and ordinances, and in public offices, will not be granted. *Muldoon v. New York Cent. & H. R. R. Co.*, 98 App. Div. 169, 91 N. Y. Supp. 65.

1780 n. 370a. *Wood v. Hoffmann*, 154 App. Div. 901, 138 N. Y. Supp. 1150.

1780 n. 371. Erratum. The text should read as follows: "As a general rule, the courts hold that the necessity must relate to the framing of pleadings or for use on the trial and not relate merely to preparation for trial." *Merrill & Baker v. Woolworth*, 53 Misc. 253, 103 N. Y. Supp. 57; *Koppel v. Hatch*, 50 Misc. 626, 98 N. Y. Supp. 619; *Loewy v. Gordon*, 114 N. Y. Supp. 211; *Bock v. Bock*, 114 N. Y. Supp. 473. Plaintiff is not entitled to an examination of the officers of defendant corporation before trial for the mere purpose of finding out upon whom the summons can be served to obtain jurisdiction of another defendant corporation. *Grant v. Greene Consol. Copper Co.*, 118 App. Div. 853, 103 N. Y. Supp. 676. That a "party" cannot be examined before action brought, except for the sole purpose of perpetuating testimony, is held in *In re Schlotterer*, 105

App. Div. 115, 93 N. Y. Supp. 895, but such holding, inasmuch as it practically overrules a long list of cases in which the examination has been allowed to frame the complaint, is of doubtful authority, and it is questionable whether it will be followed.

**1781.** Will not be granted to find out name of third person who will be witness. *Nocito v. Acierno*, 122 App. Div. 45, 106 N. Y. Supp. 785.

**1781 n. 375.** *Ketcham v. Rowland & Shafto*, 71 Misc. 439, 128 N. Y. Supp. 695. Not granted to find out what the party to be examined is prepared to prove. *Kerr v. Hammond*, 153 App. Div. 681, 138 N. Y. Supp. 619.

**1781 n. 376.** *Schulte v. Petruzzi*, 153 App. Div. 889, 137 N. Y. Supp. 1103; *Kerr v. Hammond*, 153 App. Div. 681, 138 N. Y. Supp. 619; *Merrill & Baker v. Woolworth*, 53 Misc. 253, 103 N. Y. Supp. 57. See also *Edelstein v. Goldfield*, 92 N. Y. Supp. 243. Cannot examine defendant as to tests and experiments made by him in preparing for trial. *People v. Natural Carbonic Gas Co.*, 140 App. Div. 802, 125 N. Y. Supp. 610. In an action for large damages for seduction of plaintiff's daughter, the examination generally of defendant before trial should not be ordered, since the inference is that the testimony is not sought in good faith to be used on the trial. *Wessel v. Schwarzler*, No. 1, 144 App. Div. 587, 589, 129 N. Y. Supp. 521, 522. Examination of officer of defendant company will not be ordered where apparent purpose is to pry into the defense. *Vogel Co. v. Backer Constr. Co.*, 148 App. Div. 639, 133 N. Y. Supp. 225. Cannot be ordered merely to obtain information concerning the adversary's case so as to be able to meet it. *Northern Ins. Co. of N. Y. v. Woods*, 118 N. Y. Supp. 1043. Should not be granted to meet issues which the party to be examined must first establish. *Locomobile Co. v. Nichols*, 140 N. Y. Supp. 1041. Should not be ordered to disclose items of damages claimed by the party to be examined and which he must

prove. *Sperry & Hutchinson Co. v. O'Neill-Adams Co.*, 135 App. Div. 285, 120 N. Y. Supp. 362. Items and details of damages which party must prove is not a basis for his examination. *Higgins v. N. Y. Dock Co.*, 137 App. Div. 823, 122 N. Y. Supp. 465. Should be refused where purpose is to find out how defendant intends to prove his defense of payment. *Tuthill v. Schinasi*, 141 App. Div. 520, 126 N. Y. Supp. 409; *Skelly v. Mortimer*, 154 App. Div. 921, 138 N. Y. Supp. 1100.

1781 n. 377. It is no ground for an order, however, that the testimony is necessary for the purpose of preparing for trial. *Diefendorf v. Fenn*, 125 App. Div. 651, 110 N. Y. Supp. 68.

1781 n. 378. *Matter of Besch*, 121 N. Y. Supp. 769.

1781 n. 380. *Rosenthal v. Jackson*, 125 App. Div. 895, 110 N. Y. Supp. 786; *McCormack v. Coddington*, 98 App. Div. 13, 90 N. Y. Supp. 218. See *McKenna v. Tully*, 10 App. Div. 598, 96 N. Y. Supp. 561. Especially is this so where the information can be obtained on the trial from witnesses other than parties to the action. *Knight v. Morgenroth*, 33 App. Div. 424, 87 N. Y. Supp. 693. An examination before any action is brought will not be ordered where the purpose thereof is to ascertain whether the applicant has a cause of action against persons not named. *Ellett v. Young*, 95 App. Div. 417, 88 N. Y. Supp. 661. Examination improper to find out if the proposed plaintiff has a cause of action. *Matter of Moto Bloc Import. Co.*, Nos. 1, 2, 140 App. Div. 532, 536, 125 N. Y. Supp. 427, 430.

1782. In action by wife for separation, defendant cannot be examined before trial as to matters relating to alimony. *Van Valkenburgh v. Van Valkenburgh*, 149 App. Div. 482, 133 N. Y. Supp. 942, 3 Civ. Pro. (N. S.) 47. Same rule applies to action for divorce. *Danziger v. Danziger*, 68 Misc. 452, 124 N. Y. Supp. 177; *Reynolds v. Reynolds*, 81 Misc. 362, 142 N. Y. Supp. 1.

1782 n. 387. *Watt v. Feltman*, 111 App. Div. 314, 97 N. Y. Supp. 737.

1783. In a negligence action, defendant is not ordinarily entitled to examine plaintiff before trial as to all the issues and thus obtain his version of the accident. *Wood v. Hoffman Co.*, 121 App. Div. 636, 106 N. Y. Supp. 308. In action for personal injuries, it is proper to order an examination of defendant before trial to obtain evidence in support of the cause of action and in avoidance of a special defense that the work was being done by an independent contractor. *Berg v. Wm. Horne Co.*, 146 App. Div. 412, 131 N. Y. Supp. 262. Defendant cannot be examined in personal injury suit where examination not essential to plaintiff. *Brichta v. Simon*, 152 App. Div. 832, 137 N. Y. Supp. 751. In *Koplin v. Hoe*, 123 App. Div. 827, 108 N. Y. Supp. 602, an examination of the plaintiff was allowed in a negligence case as to the circumstances of the accident on the ground that the defendant showed that his employees who were alleged to have witnessed the accident denied any knowledge of it and he had no means of discovering what occurred except through the testimony of his adversary. This is an extreme case and in *Crum v. Wright*, 82 Misc. 419, 143 N. Y. Supp. 1080, the court refused to follow it where it was not shown that the defendants' employees deny knowledge of the accident; and the ignorance of the defendants as to matters which would ordinarily be available to them cannot be regarded as established by their bare disclaimer in the absence of some explanation, and their denial of knowledge or information sufficient to form a belief as to whether or not they owned and controlled such a wagon as the one described in the complaint must be regarded as frivolous. Where the burden of proof as to contributory negligence is put on defendant, as under the Labor Law by the 1910 amendment, defendant cannot examine plaintiff, in a personal injury suit against a master, as to such contributory negligence but only

as to the nature and extent of his injuries. *Strom v. American Dist. Steam Co.*, 84 Misc. 197, 145 N. Y. Supp. 720.

**1783** n. 388. *Muldoon v. New York Cent. & H. R. R. Co.*, 98 App. Div. 169, 91 N. Y. Supp. 65.

**1783** n. 390. Distinguished in *Watt v. Feltman*, 111 App. Div. 314, 97 N. Y. Supp. 737.

**1784** n. 414. *Niehoff v. Star Co.*, 134 App. Div. 473, 119 N. Y. Supp. 247.

**1785**. An examination should not be ordered, in an action between partners where the evidence sought to be obtained is not material to the main issue but will only become material on an accounting if plaintiff succeeds on the main issue. *Hausling v. Rheinfrank*, 103 App. Div. 517, 93 N. Y. Supp. 121, and cases cited.

**1785** n. 403. *Istok v. Senderling*, 118 App. Div. 162, 103 N. Y. Supp. 13.

**1786** n. 405. Whether proposed examination was material to the issues was the only point decided in *McDonald v. Morse*, 96 App. Div. 406, 89 N. Y. Supp. 176. Testimony sought must be material and necessary. *Bergström v. Ridgway Co.*, 138 App. Div. 178, 123 N. Y. Supp. 29.

**1786** § 1381. Asking for bill of particulars does not preclude order for examination before trial. *Tisdale Lumber Co. v. Droge*, 147 App. Div. 55, 131 N. Y. Supp. 683. Should not be refused because testimony sought to be elicited may be privileged. *Bioren v. Canadian Mines Co.*, 140 App. Div. 523, 125 N. Y. Supp. 392. Nonresidence of party no ground for refusing. *Wallace v. Bacon*, 143 App. Div. 211, 128 N. Y. Supp. 130. That officers of corporation are in another state is no ground for refusing to require their examination. *Heller, H. & Co. v. General Mfg. Co.*, 155 App. Div. 211, 140 N. Y. Supp. 117.

**1786** n. 407. *Shumaker v. Doubleday, Page & Co.*, 116 App. Div. 302, 101 N. Y. Supp. 587.

**1786 n. 408.** The fact that a defendant denies the allegations of the complaint does not of itself deprive the plaintiff of a right to examine him before trial, or furnish any legal ground for vacating an order for his examination. *Istok v. Senderling*, 118 App. Div. 162; *Straus v. Peck*, 126 N. Y. Supp. 628; *Heine v. Weller*, 82 Misc. 402, 143 N. Y. Supp. 752. It is no ground for refusing that defendant in his answer has admitted knowledge or denied lack of knowledge, since plaintiff is not bound to accept such statements. *Curran v. Oppenheimer*, 143 App. Div. 271, 128 N. Y. Supp. 9, 2 Civ. Pro. (N. S.) 220. Proper, although answer is a general denial, where the nature of the action indicates plaintiff will be obliged to examine defendant on the trial to prove his cause of action. *Kornbluth v. Isaacs*, 149 App. Div. 108, 133 N. Y. Supp. 737. Where plaintiff bound to prove in the first instance the facts denied. *Plohm v. Columbia Amusement Co.*, 76 Misc. 252, 134 N. Y. Supp. 947.

**1786 n. 409.** *Turck v. Chisholm*, 53 Misc. 110, 103 N. Y. Supp. 1095.

**1786 n. 410.** *Turck v. Chisholm*, 53 Misc. 110, 103 N. Y. Supp. 1095; *Bender v. Bork*, 52 Misc. 295, 102 N. Y. Supp. 152. The application, at least in the first department, will not be denied because the movant can subpoena the witness sought to be examined nor because he will stipulate to appear at the trial nor because the evidence can be obtained through other persons. *Goldmark v. U. S. Electro-Galvanizing Co.*, 111 App. Div. 526, 97 N. Y. Supp. 1076; *McKeand v. Locke*, 115 App. Div. 174, 100 N. Y. Supp. 704; *Grant v. Greene*, 118 App. Div. 850, 103 N. Y. Supp. 674.

**1787 n. 414.** *Solar Baking Powder Co. v. Royal Baking Powder Co.*, 128 App. Div. 550, 112 N. Y. Supp. 1013; *Meade v. Southern Tier Masonic Relief Ass'n*, 119 App. Div. 761, 104 N. Y. Supp. 523. Vacation of order on such



ground held error. *Ely v. Perkins*, 127 App. Div. 823, 112 N. Y. Supp. 122.

1788 n. 415. *Reynolds v. Reynolds*, 81 Misc. 362, 142 N. Y. Supp. 1; *Ely v. Perkins*, 57 Misc. 361, 108 N. Y. Supp. 613. See also *Peterson v. Fowler*, 143 App. Div. 282, 128 N. Y. Supp. 505.

1790 § 1384. May be denied because of laches. *Dunfee v. Dunfee*, 145 App. Div. 108, 129 N. Y. Supp. 142; *Whitney v. Rudd*, 100 App. Div. 492, 91 N. Y. Supp. 429. Where a juror was withdrawn to permit a motion at Special Term to amend the complaint, but no such motion was made, an order for defendant's examination should not be granted some two years later. *Anderson v. Beston*, 140 App. Div. 301, 125 N. Y. Supp. 81.

1790 n. 430. It follows that there can be no question of laches where the application is before trial. *Goldmark v. U. S. Electro-Galvanizing Co.*, 111 App. Div. 526, 97 N. Y. Supp. 1078. A deposition of a party cannot be taken, at his own instance, "during the trial," for a cause existing and known to the party and his counsel prior to the commencement thereof. *Hebron v. Work*, 101 App. Div. 463, 92 N. Y. Supp. 149.

1790 n. 432. Only where party cannot otherwise frame his pleading. *Diefendorf v. Fenn*, 125 App. Div. 651, 110 N. Y. Supp. 68.

1790 n. 435. *Frear v. Duryea*, 151 App. Div. 687, 136 N. Y. Supp. 264; *Sprague v. Currie*, 129 App. Div. 365, 113 N. Y. Supp. 789.

1791 § 1385. A federal Circuit Court in the state of New York cannot make an order for the examination of a party before trial before a master or commissioner appointed pursuant to section 870 of the Code of Civil Procedure. *Hanks Dental Ass'n v. International Tooth Crown Co.*, 194 U. S. 303.

1791 § 1387. The affidavit itself must state the facts

required by the statute, it not being sufficient that the necessary facts may be gathered from the pleadings where the affidavit does not refer to the pleadings in any way. *Loewy v. Gordon*, 129 App. Div. 459, 114 N. Y. Supp. 211.

**1792 n. 445.** *Solar Baking Powder Co. v. Royal Baking Powder Co.*, 128 App. Div. 550, 112 N. Y. Supp. 1013. A formal averment that plaintiff desired the examination of the corporation is unnecessary. *Donaldson v. Brooklyn Heights R. Co.* 119 App. Div. 513, 104 N. Y. Supp. 178. Affidavit not naming any officer of the corporation whose examination is sought is insufficient. *Turk v. H. Koehler & Co.*, 144 App. Div. 53, 128 N. Y. Supp. 809. Merely describing person sought to be examined as "managing" agent is not sufficient to show that he is an officer. *Herzig v. Washington Fire Ins. Co.*, 144 App. Div. 174, 128 N. Y. Supp. 988.

**1793 n. 448.** Cannot allege materiality both for the purpose of framing complaint and of preparing for trial. *Diefendorf v. Fenn*, 125 App. Div. 651, 110 N. Y. Supp. 68.

**1795 n. 459.** Failure to so state is ground for vacating order. *Mitchell v. Greene*, 121 App. Div. 677, 106 N. H. Supp. 449.

**1796 § 1388.** The evidence tending to prove the necessary facts need not be stated. *Grant v. Greene*, 118 App. Div. 850, 103 N. Y. Supp. 674. In an action for personal injuries, the affidavit for examination of defendant need not mention any specific fact in connection with the accident as to which the examination is wanted. *Cherbuliez v. Parsons*, 123 App. Div. 814, 108 N. Y. Supp. 321.

**1796 n. 466.** Sufficient to make pleadings a part of the affidavit. *Continental Securities Co. v. Belmont*, 147 App. Div. 118, 131 N. Y. Supp. 713. It is sufficient to refer to the complaint attached to the affidavit and made a part thereof, though the complaint is not verified. *Grant v. Greene*, 118 App. Div. 850, 103 N. Y. Supp. 674.

**1796** n. 467. See also *Cohen v. Hecht*, 128 App. Div. 511, 112 N. Y. Supp. 809.

**1797** n. 472. *Rappolt v. Baring*, 139 App. Div. 132, 123 N. Y. Supp. 795; *Boskowitz v. Sulzbacher*, 121 App. Div. 878, 106 N. Y. Supp. 865.

**1797** n. 473. *Del Genovese v. Del Genovese*, 149 App. Div. 266, 133 N. Y. Supp. 765; *Rogers v. Adler*, 137 App. Div. 197, 121 N. Y. Supp. 941; *Reynolds v. Callan*, 134 App. Div. 732, 119 N. Y. Supp. 135; *Segschmeider v. Waring Hat Mfg. Co.*, 134 App. Div. 217, 118 N. Y. Supp. 1000. See *Oppenheimer v. Van Raalte*, 151 App. Div. 601, 136 N. Y. Supp. 197. "Material" and "necessary" are not synonymous. *Koplin v. Hoe*, 123 App. Div. 827, 108 N. Y. Supp. 602. Sufficiency of showing as to advice of counsel, see *Ehrich v. Winter & Co.*, 52 Misc. 641, 103 N. Y. Supp. 1023. But inasmuch as the necessity depends on different rules according to whether the application is for the purpose of framing a pleading or to prepare for trial, the two purposes cannot be combined in one affidavit. *Frear v. Duryea*, 151 App. Div. 687, 136 N. Y. Supp. 264. Statement of defendant in his affidavit that he is ignorant of agreement alleged in complaint is insufficient where he has denied the agreement without qualification in his answer. *Jenning v. Gunnison*, 126 N. Y. Supp. 582.

**1798** n. 475. *Higgins v. N. Y. Dock Co.*, 137 App. Div. 823, 122 N. Y. Supp. 465; *Segschmeider v. Waring Hat Mfg. Co.*, 134 App. Div. 217, 118 N. Y. Supp. 1000. While the strict rules at one time applied by the courts to these applications have been relaxed, the said court rule and Code provisions have not been changed. *Oaks v. Star Co.*, 119 App. Div. 358, 104 N. Y. Supp. 244; *Loewy v. Gordon*, 129 App. Div. 459, 114 N. Y. Supp. 211; *Irving v. Higgins*, 131 App. Div. 184, 115 N. Y. Supp. 254.

**1799** n. 484. *Ehrich v. Root*, 122 App. Div. 719, 107 N. Y. Supp. 846.

**1800 n. 490.** Hagerty v. Pinelawn Cemetery, 138 App. Div. 905, 122 N. Y. Supp. 843; Ketcham v. Rowland & Shafto, 71 Misc. 439, 128 N. Y. Supp. 695; Bock v. Bock, 130 App. Div. 229, 114 N. Y. Supp. 473. In a negligence action defendant may in good faith say that it intends to use the deposition of plaintiff on the trial. Koplin v. Hoe, 123 App. Div. 827, 108 N. Y. Supp. 602.

**1800 n. 491.** Oppenheimer v. Van Raalte, 151 App. Div. 601, 136 N. Y. Supp. 197; McCormack v. Coddington, 98 App. Div. 13, 90 N. Y. Supp. 218; Ehrich v. Winter & Co., 52 Misc. 641, 103 N. Y. Supp. 1023. An order for the examination of a party before trial, after joinder of issue, cannot be obtained unless it fairly appears from the moving papers that it is intended to use the evidence upon the trial. Whitney v. Rudd, 100 App. Div. 492, 91 N. Y. Supp. 429.

**1801.** Affidavits on information and belief are sufficient to obtain an examination of defendant, as to fraud claimed to be solely within defendant's knowledge. Kornbluth v. Isaacs, 149 App. Div. 108, 133 N. Y. Supp. 737. Insufficient where sources of information not stated. Mitchell v. Central Mines Development Co., 124 App. Div. 325, 108 N. Y. Supp. 953.

**1801 n. 500.** Compare Meade v. Southern Tier Masonic Relief Ass'n, 119 App. Div. 761, 104 N. Y. Supp. 523.

**1802 n. 503.** Reed v. Smith, 122 App. Div. 795, 107 N. Y. Supp. 893.

**1802 § 1390.** Omissions in moving affidavits may be supplied by opposing affidavits. Peterson v. Fowler, 143 App. Div. 282, 128 N. Y. Supp. 505. Where the motion to vacate is made on the original papers and also on other affidavits alleging bad faith, counter affidavits are proper to show good faith but not to supply material defects and omissions in the original affidavits. Boskowitz v. Sulzbacher, 121 App. Div. 878, 106 N. Y. Supp. 865.

**1803 § 1392.** See Weber v. Columbia Amusement Co.,

154 App. Div. 881, 138 N. Y. Supp. 878. Examination must be limited to the issues in the action. *Palumbo v. L'Araldo Italiano Pub. Co.*, 150 App. Div. 221, 134 N. Y. Supp. 655. Order for examination of defendant should be limited to the allegations put in issue by the answer. *Skolny v. Richter*, 132 App. Div. 680, 117 N. Y. Supp. 297. Examinations of a party and persons not parties should not be required in the same order. *Diefendorf v. Fenn*, 125 App. Div. 651, 110 N. Y. Supp. 68; *Chartered Bank of India v. North River Ins. Co.*, 136 App. Div. 646, 121 N. Y. Supp. 399. In equity suit for an accounting, examination of defendant should be limited to matters necessary to be proved to obtain an interlocutory judgment. *Slaughter v. Turkel*, 146 App. Div. 620, 131 N. Y. Supp. 324; *Del Genovese v. Del Genovese*, 149 App. Div. 266, 133 N. Y. Supp. 765. See also *Thompson v. Alden*, 135 App. Div. 57, 119 N. Y. Supp. 742. Order for defendant's examination should not provide for examination regarding defenses. *Sullivan v. Ryan-Parker Const. Co.*, 148 App. Div. 246, 132 N. Y. Supp. 346. Order for defendant's examination should be limited to matters which plaintiff must prove. *Geo. J. Roberts & Co. v. Leary*, 130 N. Y. Supp. 156. The order, in a case where a corporation is to be examined, must require the company to be examined through its officers and not the officers individually. *Shumaker v. Doubleday, Page & Co.*, 116 App. Div. 302, 101 N. Y. Supp. 587. The order cannot require the party to answer the questions in writing and to verify and file the same. *Matter of Sands*, 112 App. Div. 649, 98 N. Y. Supp. 459. Directing examination of corporation instead of officer thereof is amendable. *Palumbo v. L'Araldo Italiano Pub. Co.*, 150 App. Div. 221, 134 N. Y. Supp. 655. Stay may be granted until examination. *Ewen v. Hoefer*, 155 App. Div. 885, 139 N. Y. Supp. 1054. Scope of order for defendant's examination in breach of promise suit, see *Rowley v. Gorham*, 154 App. Div. 906, 138 N. Y. Supp. 1140.

**1803 n. 508.** See *Berg v. Wm. Home Co.*, 146 App. Div. 412, 131 N. Y. Supp. 262; *Malcom v. Gibson*, 119 App. Div. 881, 104 N. Y. Supp. 753. Order should not direct general examination where materiality is shown only as to a single issue. *Marjori v. Waddington*, 56 Misc. 435, 107 N. Y. Supp. 197. Modifying order, see *Wood v. Hoffmann*, 154 App. Div. 901, 138 N. Y. Supp. 1150.

**1803 n. 509.** *Alden v. O'Brien*, 138 App. Div. 249, 122 N. Y. Supp. 910. In an action for an accounting, the order may require an examination as to all matters material to the issue. *Griffen v. Davis*, 99 App. Div. 65, 90 N. Y. Supp. 491.

**1804 n. 516.** *Boyle v. Consolidated Gas Co.*, 46 Misc. 191, 94 N. Y. Supp. 27. The order may provide for the issuance of a subpoena duces tecum. *Crompton v. Dobbs*, 119 App. Div. 331, 104 N. Y. Supp. 698; *Grant v. Leopold*, 61 Misc. 79, 113 N. Y. Supp. 167. This provision was amended in 1911 by adding the following: "And on such examination the books or papers, or any part or parts thereof may be offered and received in evidence in addition to the use thereof by the witness to refresh his memory." Order must be definite. *West v. Baltimore & O. R. Co.*, 153 App. Div. 917, 138 N. Y. Supp. 1148. Order for examination of corporation should not require production of books and papers of third person over whose books and papers it is not shown to have any control. *New York Assets R. Co. v. Pforzheimer*, 158 App. Div. 700, 143 N. Y. Supp. 698. Failure to comply with order is punishable as a contempt. *Edison Electric Light Co. v. Tipless Lamp Co.*, 72 Misc. 116, 130 N. Y. Supp. 1089.

**1804 n. 516a.** The issue of a subpoena duces tecum should not be allowed until, upon examination, it appears that the papers are necessary. *Wilson v. Nevins*, 63 Misc. 380, 118 N. Y. Supp. 421.

**1804 n. 517.** *Thompson v. Alden*, 135 App. Div. 57, 119 N. Y. Supp. 742; *Coin Novelty Co. v. Lindenborn*, 121 App.

Div. 885, 106 N. Y. Supp. 508; *Matter of Thompson*, 95 App. Div. 542, 89 N. Y. Supp. 4; *Matter of Sands*, 98 App. Div. 148, 90 N. Y. Supp. 749; *Hirshfield v. I. Rosenthal & Co.*, 51 Misc. 644, 99 N. Y. Supp. 912. This rule seems to be changed by the 1911 amendment of the Code set forth above (1804 n. 516). A corporation ought not to be required to produce its books, upon the examination of one of its officers before trial, to enable him to refresh his memory therefrom while on the stand, unless he requires their assistance in order to testify concerning the matters in regard to which he is to be examined. *Bruen v. Whitman Co.*, 106 App. Div. 248, 94 N. Y. Supp. 304. The remedy does not take the place of the general Code provision as to production and discovery of books, etc. *Ryan v. New York Cent. & H. R. R. Co.*, 124 App. Div. 34, 108 N. Y. Supp. 371.

1805 n. 520. The officer of the corporation cannot refuse to obey the order to produce the books to refresh his memory on the ground that they may tend to incriminate him. *Pray v. C. A. Blanchard Co.*, 95 App. Div. 423, 88 N. Y. Supp. 650.

1805. Form of order for examination, see *Malcom v. Gibson*, 119 App. Div. 881, 104 N. Y. Supp. 753.

1805 n. 521. *Wood v. J. L. Mott Iron Works*, 114 App. Div. 108, 99 N. Y. Supp. 677. The affidavit must go further than to show a necessity that the books be produced. It must, primarily, show that the examination of the person sought to be examined is material and necessary. *Matter of Thompson*, 95 App. Div. 542, 89 N. Y. Supp. 4; *Miller v. Nevins*, 115 App. Div. 139, 100 N. Y. Supp. 703. Order for production of books denied with leave to renew if it appears on the examination before trial that their production is necessary. *Lyon & Healy v. Musical Courier Co.*, 156 App. Div. 929, 142 N. Y. Supp. 1128.

1805 n. 523. *Gottlieb v. A. Entemann*, 157 App. Div. 251, 141 N. Y. Supp. 860; *Regan v. Gorham Co.*, 129 App. Div. 315, 113 N. Y. Supp. 738.

**1805** n. 524. *Knickerbocker Trust Co. v. Schroeder*, 125 App. Div. 917, 109 N. Y. Supp. 1024.

**1806** n. 525. An order of examination should be vacated where it directs the examination to take place four days after the granting thereof, without stating any reason for a notice of less than five days. *Osborn v. Barber*, 105 App. Div. 236, 93 N. Y. Supp. 833.

**1806** § 1393. Where party has not appeared in action and he resides in foreign country, it is proper to direct service on him by mail. *Ely v. Perkins*, 127 App. Div. 823, 112 N. Y. Supp. 122. If party has appeared, service should be on his attorney. *Turk v. H. Koehler & Co.*, 144 App. Div. 53, 128 N. Y. Supp. 809.

**1806** n. 527. Time for service on attorney is not the same as limited for service of the order on the party himself, but service within a reasonable time (four days) is sufficient. *Tur v. Arrue*, 156 App. Div. 547, 141 N. Y. Supp. 586.

**1808** § 1398. Where the order is too broad, it may be modified on a motion to vacate it. *Solar Baking Powder Co. v. Royal Baking Powder Co.*, 128 App. Div. 550, 112 N. Y. Supp. 1013. Where order is too broad, it should be modified and not vacated. *Cohen v. Hecht*, 128 App. Div. 511, 112 N. Y. Supp. 809. If order is too broad in its scope, the remedy is to move to limit the examination but not to vacate it in toto. *Anderson v. Lisman*, 130 App. Div. 134, 114 N. Y. Supp. 348. The order should not be vacated merely because the action is pending and on trial before a referee. *Hollenberg v. Greene*, 120 App. Div. 813, 105 N. Y. Supp. 664. An order denying a motion to vacate should not stay the trial until the party submits to an examination, where not prayed for nor any good cause therefor shown. *Oakes v. Star Co.*, 119 App. Div. 358, 104 N. Y. Supp. 244. Order for defendant's examination will not be vacated on the ground that the real purpose is to cross-examine defendant before trial. *Currie v. Sprague*, 131 N. Y. Supp. 325.



Order should be vacated where moving party admits the only fact on which his examination was necessary. *Berger v. Herbert*, 81 Misc. 360, 142 N. Y. Supp. 2. Motion to vacate should be denied where all proceedings have been stayed by order until officers of a corporation were examined. *Dennis v. Stock, Grain & Provision Co.*, 144 App. Div. 585, 129 N. Y. Supp. 760. Not ground that action is in equity for an accounting, where defendant has itself had the action transferred to the trial calendar as one at law. *Sullivan v. Ryan-Parker Constr. Co.*, No. 2, 148 App. Div. 246, 132 N. Y. Supp. 346. Order of examination will not be vacated because the moving party is late at the call of the calendar on the motion to vacate. *Smith v. Smith*, 76 Misc. 254, 134 N. Y. Supp. 901.

**1808 n. 534a.** Where defendant, without any intimation of intention to attack the original order, twice requested the favor of an adjournment and twice in writing stipulated "that the said examination shall take place" on a designated day, he waived the right to move to vacate, and should not be allowed to do so. *Schweinburg v. Altman*, 131 App. Div. 795, 116 N. Y. Supp. 318.

**1809 n. 546.** But not where the party is a non-resident and not served within the state. *Wolf v. Union Waxed, etc., Co.*, 148 App. Div. 623, 133 N. Y. Supp. 239.

**1809 n. 550.** Otherwise, it seems, where party is a non-resident. *Wolf v. Union Waxed, etc., Co.*, 148 App. Div. 623, 133 N. Y. Supp. 239. Where a non-resident sues here, and an order for his examination before trial has been served on his attorneys, defendant is entitled to an order staying proceedings until plaintiff submits to examination. *Balestier v. Tribune Assoc.*, 69 Misc. 72, 125 N. Y. Supp. 845.

**1810 § 1402.** That defendant has right to orally cross-examine, where plaintiff is examined by his coplaintiffs, see *McManus v. Durant*, 142 App. Div. 775, 127 N. Y. Supp. 497. Questions the sole purpose of which are to have the

witness read into the record entries in books, rather than to disclose the recollection of the witness as refreshed therefrom, are improper. *Searle v. Halstead & Co.*, 139 App. Div. 134, 123 N. Y. Supp. 984. Relevancy of questions, and not the competency and admissibility of the evidence, is the only matter to be considered. *Guenther v. Ridgway Co.*, 159 App. Div. 74, 143 N. Y. Supp. 961 [disapproving dicta in *Gavin v. N. Y. Cont. Co.*, 122 App. Div. 643, 107 N. Y. Supp. 272]. Where the witness refused to answer certain questions a motion for an order directing him to answer all the questions held improperly granted where such questions called for immaterial testimony. *Gavin v. New York Contracting Co.*, 122 App. Div. 643, 107 N. Y. Supp. 272. "It will be observed that the Legislature did not confer authority on the justice of the court before whom the examination is had, or on the justice or the court if it be had before a referee, to pass upon the *competency* or *admissibility* of the evidence. It merely conferred authority to determine whether questions are *relevant*, and whether the witness is bound to answer, which evidently was intended to provide for cases in which the witness would be privileged from testifying, for by the express provisions of section 883 of the Code of Civil Procedure, it is provided that such a deposition has the same, and no other, effect 'as the oral testimony of the witness would have' on the trial, 'and an objection to the competency or credibility of the witness, or to the relevancy or substantial competency of a question put to him, or of an answer given by him, may be made as if the witness was then personally examined and without being noted upon the deposition.' If this were not so, it is manifest that such examinations could be readily delayed and the justices or courts of original jurisdiction would have their time occupied in examining questions and making rulings that would have no binding effect on the trial court, and a party might thus be precluded from having the benefit of evidence which the

trial court would deem competent and admissible. Moreover, the time of the courts of appeal would be occupied with frivolous appeals, which would accomplish nothing, save possibly to deprive a litigant of the right to competent evidence upon the trial of his action, or to have the question of its competency presented upon the trial of the issues where a record could be made which would enable him to present the question intelligently to an appellate court. I am of opinion, therefore, that it is of importance to the parties to a particular litigation and to the general public, which is interested in having business before the courts dispatched, that we declare and adhere to the rule in accordance with that prescribed in said sections 880 and 883 by the Legislature that only questions relating to the relevancy of the evidence to the issues, and with respect to whether the witness is privileged from answering, should be considered on such applications." *Guenther v. Ridgway Co.*, 159 App. Div. 74, 143 N. Y. Supp. 961.

**1811 § 1403.** Inasmuch as books are merely to refresh memory, party may refuse to translate item, where it does not refresh his memory. *Shogry v. Naser*, 80 Misc. 145, 140 N. Y. Supp. 1014. Referee taking examination of witness not a party may direct books and papers actually present be produced for examination, without a subpoena duces tecum. *Searle v. Halstead & Co.*, 139 App. Div. 134, 123 N. Y. Supp. 984.

**1811 n. 560.** *Williams v. Snowman*, 142 N. Y. Supp. 225. "The referee, upon an examination of the adverse party before trial, undoubtedly had power to issue the subpoena duces tecum (Code Civ. Proc., § 854; *Knickerbocker Trust Co. v. Schroeder*, 125 App. Div. 917, 109 N. Y. Supp. 1024; *Gibbons v. San Luis Min. Co.*, 125 App. Div. 741, 110 N. Y. Supp. 96), and the fact that the order directing the examination indicated the court's refusal at that time to order the production of the books and papers in question in no way

affects the validity of the subpoena (Gibbons v. San Luis Min. Co., *supra*), the issuance of which was, indeed, contemplated by the court in the course of the proceedings, should the necessity arise." Littlefield v. Gansevoort Bank, 62 Misc. 339, 114 N. Y. Supp. 769; Gibbons v. San Luis Mining Co.; 125 App. Div. 741, 110 N. Y. Supp. 96. See Thayer v. Schley, 58 Misc. 352, 110 N. Y. Supp. 1104. Subpoena may issue before examination has commenced, where necessity therefor clearly appears. Crompton v. Dobbs, 119 App. Div. 331, 104 N. Y. Supp. 698.

**1814 n. 579.** Only where the deposition was properly taken and certified to can it be filed *nunc pro tunc*. Lowther v. Sullivan, 63 Misc. 51, 116 N. Y. Supp. 588.

**1815.** A deposition of a party taken by his coparty may be read in evidence though the former is present at the trial. Hetzel v. Easterly, 96 App. Div. 517, 533, 89 N. Y. Supp. 154.

**1815 n. 583.** By Code amendment in 1911 this rule is extended to use as evidence in special proceedings. At the end of this Code provision, by amendment in 1911, the following is added: "including the case where one of the parties is the executor of the will or administrator of the estate of the witness and is given a cause of action by reason of § 1902 of this act. And except in the cases prescribed to the contrary in § 882 of this act, the said deposition, or a certified copy thereof, may be read in evidence by either party to the action or special proceeding in which it is taken, and as between the defendant in said action and the legal representatives and privies in interest and estate of the plaintiff, and as between the plaintiff and the legal representatives and privies in interest and estate of the defendant, and as between the legal representatives and privies in interest and estate of the defendant and the legal representatives and privies in interest and estate of the plaintiff."

## CHAPTER V

## PHYSICAL EXAMINATION OF PARTY

**1817.** As stated in volume 2, the Code provision for a physical examination applies only to actions for personal injuries, and hence in other actions the application must be based on the inherent power of the court. In *Gore v. Gore*, 103 App. Div. 168, 93 N. Y. Supp. 296, the power to require an examination in an action to annul a marriage on the ground of impotency, is reiterated, but it is held that the order should not direct the deposition of the examining physicians to be taken out of court and before trial. Parker, P. J., in the opinion, makes the following statements: "I can discover no reason why a referee should be appointed to conduct the proceeding under which such examination is had, or to take, by way of depositions, the evidence, or any part of the evidence, bearing upon that question. An order can be made that the defendant submit to such an examination to be taken upon and as a part of the trial, and the evidence of the surgeons can also be taken as a part of such trial, and before the court. And while I would not hold that a reference may not, in any instance, be ordered, at which such evidence may be taken, I am of the opinion that it should never be done unless peculiar circumstances clearly require it."

**1818 § 1412.** Will not be granted to inquire into previous history and physical condition. *Smyth v. Lichtenstein*, No. 2, 137 App. Div. 335, 122 N. Y. Supp. 74. Where party ordered to appear for examination before trial, presents physician's affidavit as to his illness on the day set for examination, court cannot order physical examination of party. *Moore v. Reinhardt*, 136 App. Div. 617, 121 N. Y. Supp. 205. "The examination of witnesses before trial is purely statutory, and authority for a physical examination of a party to an action does not include authority to take photographs

or X-ray pictures of the party, and this is specially true where the defendant has already, by consent of the plaintiff, had the advantage of a physical examination." *Lasher v. Bolton's Sons*, 161 App. Div. 381, 146 N. Y. Supp. 321.

**1818** n. 5. An action for breach of promise to marry with seduction and pregnancy alleged as grounds of damage is not one for a personal injury. *Pitt v. Dunlap*, 54 Misc. 115, 105 N. Y. Supp. 846.

**1819** § 1413. Not a matter of absolute right. *Mizak v. Carborundum Co.*, 75 Misc. 205, 132 N. Y. Supp. 1104. The motion has been held properly denied where defendant had been examined by three physicians, on her stipulation permitting them to testify as to her condition, the action being to annul a marriage for physical incapacity. *Geis v. Geis*, 116 App. Div. 362, 101 N. Y. Supp. 845.

**1820** n. 12. *Landau v. Citron*, 47 Misc. 354, 93 N. Y. Supp. 1111. See *Tirpak v. Hoe*, 53 Misc. 532, 103 N. Y. Supp. 795.

**1820** § 1415. Must appear that defendant is ignorant of nature and extent of injuries. *Mizak v. Carborundum Co.*, 75 Misc. 205, 132 N. Y. Supp. 1104.

**1822** § 1417. Order must protect plaintiff from disreputable and objectionable handling. *Mizak v. Carborundum Co.*, 75 Misc. 205, 132 N. Y. Supp. 1104. Order cannot direct examination of physician. *Wood v. Hoffman*, 56 Misc. 66, 106 N. Y. Supp. 940. If plaintiff refuses to obey the order the complaint may be stricken out. *Smith v. New Jersey & H. R. R. & Ferry Co.*, 123 App. Div. 493, 108 N. Y. Supp. 415. Form of order, see *Potter v. Village of Hammondsport*, 112 App. Div. 91, 98 N. Y. Supp. 186.

**1822** n. 18. See also *Potter v. Hammondsport*, 112 App. Div. 91, 98 N. Y. Supp. 186.

**1822** § 1418. In connection with the physical examination of plaintiff, defendant may examine him as to the character and extent of his injuries; but the deposition of the examining

physician should not be ordered taken in connection with the physical examination. *Wood v. Hoffman Co.*, 121 App. Div. 636, 106 N. Y. Supp. 308. Physician appointed to make examination cannot be compelled by the court to make a report. *Mizak v. Carborundum Co.*, 75 Misc. 205, 132 N. Y. Supp. 1104.

**1823 § 1419.** If plaintiff has voluntarily submitted to an examination at defendant's request, an order for a second examination should not be granted unless the moving papers show reasons therefor. *Orlando v. Syracuse Rapid Transit R. Co.*, 109 App. Div. 356, 95 N. Y. Supp. 898.

## CHAPTER VI

### DISCOVERY AND INSPECTION

**1825 § 1420.** Equity action for discovery only cannot be maintained. *Rice v. Peters*, 58 Misc. 381, 111 N. Y. Supp. 5.

**1827 § 1423.** Only a party can move. *Bradley v. Bradley*, 137 App. Div. 751, 122 N. Y. Supp. 626.

**1827 n. 10.** *Muller v. Philadelphia*, 118 App. Div. 276, 103 N. Y. Supp. 387. In action by executors. *Muller v. Philadelphia*, 55 Misc. 28, 104 N. Y. Supp. 781. This Code provision was amended in 1913 so as to permit a photograph as well as a copy of the papers. *People ex rel. Robin v. Hayes*, 84 Misc. 263, 147 N. Y. Supp. 102 (permitting recent inmate of penitentiary to photograph papers in possession of warden).

**1827 nn. 12-14.** *Societe Anonyme Des Glaces Nationales Belges v. Kahn*, 128 App. Div. 919, 112 N. Y. Supp. 830.

**1827 n. 13.** Defense need not be an affirmative one. *Iroquois Hotel & Apartment Co. v. Iroquois Realty Co.*, 126 App. Div. 814, 111 N. Y. Supp. 172.

**1829 § 1425.** No ground for refusing that the moving party is merely seeking a technical defense to a just claim.

Title Guaranty & Surety Co. v. Culgin Pace Cont'g Co., 66 Misc. 157, 121 N. Y. Supp. 226.

1829 n. 20. See Lane v. O. F. Jonasson & Co., 128 App. Div. 266, 112 N. Y. Supp. 655.

1829 n. 22. See Kamber v. Franklin Transp. Co., 52 Misc. 640, 102 N. Y. Supp. 804.

1830. The fact that plaintiff is a representative of a deceased person does not afford him any further or additional rights. Falco v. New York, N. H. & H. R. R. Co., 161 App. Div. 735, 146 N. Y. Supp. 1024.

1830 n. 28. See also Cohn v. Hessel, 95 App. Div. 548, 88 N. Y. Supp. 1057.

1830 n. 29. Thomas v. Guy B. Waite Co., 113 App. Div. 494, 99 N. Y. Supp. 297.

1832 n. 37. See also Snyder v. De Forest Wireless Tel. Co., 113 App. Div. 840, 99 N. Y. Supp. 644. That plaintiff is a foreign corporation and the books and papers are not within the state does not preclude an order in behalf of defendant. National Distilling Co. v. Van Emden, 120 App. Div. 746, 105 N. Y. Supp. 657. Inspection of books of account of defendant should not be refused because it is a foreign corporation and its books may be out of the state. Sullivan v. Ryan-Parker Const. Co., 148 App. Div. 243, 132 N. Y. Supp. 344.

1832 n. 38. An order should not be granted under this Code provision where it is not shown that the moving party is ignorant of the facts proposed to be discovered, nor where access to the land was offered by the adverse party who imposed reasonable conditions. Suter v. New York, 89 App. Div. 494, 85 N. Y. Supp. 989.

1833 § 1430. A picture is not a "book, document or other paper." Wilson v. Collins, 57 Misc. 363, 365, 109 N. Y. Supp. 660, 662.

1833 § 1431. By amendment in 1909, the right to a discovery is extended to "any article or property," and by



amendment in 1913 photographs may be allowed to be taken. Since the 1909 amendment, a discovery may be had as to a broken rope, the cause of the accident. *Dugan v. American Transfer Co.*, 160 App. Div. 11, 145 N. Y. Supp. 31. So, under 1909 amendment, may be ordered to obtain a sample of the water used in boilers, where steam pipe burst and injured plaintiff. *Neyer v. Transit Development Co.*, 139 App. Div. 724, 124 N. Y. Supp. 463. In action for personal injuries, order for inspection of machine and photographing it is proper. *Chojnacki v. Interborough, etc., R. Co.*, 76 Misc. 427, 134 N. Y. Supp. 1090; *Donoghue v. Callanan*, 152 App. Div. 162, 136 N. Y. Supp. 657. So, in an action by a pledgor to recover the value of a pledge alleged to have been stolen by burglars from defendants' vault wherein they kept such pledges, where plaintiff claims that the loss was caused through the negligence of defendants, an inspection of the vault, and the taking of photographs thereof, should be allowed. *Rosen v. Simons*, 82 Misc. 407, 143 N. Y. Supp. 726. But Code does not authorize order entitling plaintiff to go upon defendant's property in a general search for evidence. *Cuca v. Lackawanna Steel Co.*, 138 App. Div. 421, 122 N. Y. Supp. 732 (per Kruse, J.). So dead body is not "article or property," in action for damages causing death. *Danahy v. Kellogg*, 70 Misc. 25, 126 N. Y. Supp. 444. And where years have elapsed since the time of the injury, so that the present condition of the place where the injury occurred will throw no light on the previous condition, an inspection of the premises should not be allowed. *Cuca v. Lackawanna Steel Co.*, 138 App. Div. 421, 122 N. Y. Supp. 732.

1834 n. 45. *Pina Maya-Sisal Co. v. Geo. L. Squire Mfg. Co.*, 55 Misc. 325, 105 N. Y. Supp. 482. The clause "or to make discovery of any article or property" is added to section 803 of the Code by Laws 1909, c. 173. It follows that now said rule of court is reiterated by statute,

**1835 n. 50.** Contrary to the rule stated, it has been held that discovery of an instrument alleged to be a libel should not be ordered. *Riddle v. Blackburne*, 125 App. Div. 893, 110 N. Y. Supp. 748.

**1835 n. 53.** See *Webb v. Homer W. Hedge Co.*, 133 App. Div. 420, 117 N. Y. Supp. 643. Must be necessary. *Moore v. Reinhardt*, 117 N. Y. Supp. 534.

**1837 n. 62.** *Hotchkiss v. Levi*, 140 App. Div. 525, 125 N. Y. Supp. 462.

**1837 § 1439.** Inspection of books may be ordered to ascertain if the damages claimed have been sustained. *Reich v. Bliss Building, Inc.*, 73 Misc. 20, 130 N. Y. Supp. 827.

**1837 n. 62a.** *Edmonds v. Attucks Music Pub. Co.*, 117 App. Div. 486, 102 N. Y. Supp. 636. In an action for certain relief and for an accounting, plaintiff must establish his right to an accounting before he can be granted discovery of books and papers material only on an accounting. *Fogarty v. Fogarty*, 128 App. Div. 272, 275, 112 N. Y. Supp. 742, 744.

**1838 n. 65.** So where, in an action for breach of contract, defendant alleges the making of a new written contract, and plaintiff shows that he has no knowledge of the new contract, it is improper to refuse to plaintiff an order for inspection. *Moore v. Encyclopedia Britannica Co.*, 43 Misc. 618, 88 N. Y. Supp. 133.

**1838 § 1440.** Roving examination of all of books of a going concern will not be allowed, where information sought can be obtained by an examination before trial. *Coslon v. Mawhinney*, 122 N. Y. Supp. 270.

**1838 n. 67.** See *Brewster v. F. G. Brewster Co.*, 127 App. Div. 729, 111 N. Y. Supp. 1026. In an action to recover a portion of the master's net receipts as wages, an order for an inspection of his books is properly refused. *Harbaugh v. Middlesex Securities Co.*, 110 App. Div. 633, 97 N. Y. Supp. 350; *Strauss v. Von Tobel*, 131 App. Div. 823,

116 N. Y. Supp. 95. "The relation between the parties was merely that of employee and employer. There was no partnership or joint adventure. His compensation, under the agreement alleged by him, was to be measured by an amount equal to a certain proportion of the receipts of a certain kind, less certain expenses. There was nothing in that relation which entitled him after discharge to an inspection and examination of defendant's books. To allow the plaintiff a roving commission entitling him to a general investigation of the defendant's books would be extremely unjust. The business books of a going concern will not be compelled to be deposited in court for a space of time, nor will the admission of outsiders to the office of the company during business hours for a considerable period be directed except for cogent reasons." *Harbaugh v. Middlesex Securities Co.*, 110 App. Div. 633, 97 N. Y. Supp. 350.

**1839.** In action by salesman to recover commissions, under contract of employment, inspection of all of defendant's books will not be ordered. Proper procedure is examination before trial and subpoena duces tecum. *Ortman v. Bailey*, 160 App. Div. 258, 145 N. Y. Supp. 541.

**1839 § 1441.** Not granted defendant as to matters upon which plaintiff has the burden of proof. *Yellow Taxicab Co. v. Gaynor*, 159 App. Div. 899, 144 N. Y. Supp. 599.

**1840 n. 82.** When necessary to prepare for trial, an inspection will be granted. *De Koven v. Ziegfield*, 52 Misc. 93, 101 N. Y. Supp. 586.

**1841 § 1442.** Not proper to refresh memory of party as a witness, where the documents were evidence available at the trial. *Christman v. Keck*, 138 App. Div. 654, 122 N. Y. Supp. 676.

**1842 § 1444.** Where discovery is sought as to articles or property other than books and the like, the admissibility of evidence in regard thereto cannot be considered. *Beyer v.*

Transit Development Co., 139 App. Div. 724, 124 N. Y. Supp. 463.

1842 n. 90. Inspection of books of partnership will not be allowed, where not in any way material to the issue. *Gow v. Ward*, 144 App. Div. 593, 129 N. Y. Supp. 466.

1842 n. 93. An inspection of original reports of the accident made by the employees of the defendant company cannot be allowed. *Falco v. New York, N. H. & H. R. R. Co.*, 161 App. Div. 735, 146 N. Y. Supp. 1024.

1842 n. 95. On the other hand, where the materiality appears from the moving papers, it is no objection that a complaint has not been served. *Peck v. Peck*, 57 Misc. 94, 107 N. Y. Supp. 925.

1842 § 1445. Order is premature in action for an accounting, where applied for before interlocutory judgment, if relating merely to the accounting. *Conrady v. Buhre*, 148 App. Div. 776, 133 N. Y. Supp. 245.

1842 n. 96. See *Schultze v. Huttlinger*, 145 App. Div. 276, 130 N. Y. Supp. 53. This rule, however, does not apply where the right to inspect is created by contract. *Fidelity & Casualty Co. v. Seagrist*, 79 App. Div. 614, 617, 80 N. Y. Supp. 227; *Martin v. New Trinidad Lake Asphalt Co.*, 87 App. Div. 472, 84 N. Y. Supp. 711; *Vallenberg v. Wahn*, 103 App. Div. 34, 92 N. Y. Supp. 830.

1843. Provision in contract may authorize discovery of all of books of party. *Cream of Wheat Co. v. American Home Magazine Co.*, 159 App. Div. 761, 144 N. Y. Supp. 873.

1843 n. 100. These cases do not apply where the right to inspection is created by contract. *Vallenberg v. Wahn*, 103 App. Div. 34, 92 N. Y. Supp. 830.

1843 n. 105. See *Sullivan v. Ryan-Parker Const. Co.*, 148 App. Div. 243, 132 N. Y. Supp. 344.

1844 n. 106. Compare *Klein v. David*, 156 App. Div. 893, 141 N. Y. Supp. 399.

1844 § 1446. See also ante, 1833 § 1431.

**1845 n. 114.** Laches held not fatal, where not prejudicial. *Smith v. Rubel*, 149 App. Div. 670, 134 N. Y. Supp. 400.

**1845 n. 116.** *Ferguson v. Bien*, 49 Misc. 450, 97 N. Y. Supp. 986.

**1845 § 1447.** Under 1911 amendment of § 768 of the Code, application may be instituted by an affidavit. *Chojnacki v. Interborough, etc., R. Co.*, 76 Misc. 427, 134 N. Y. Supp. 1090. Prior thereto the law was that the motion would not be granted where based on an affidavit instead of a petition. *Lee v. Winans*, 99 App. Div. 297, 90 N. Y. Supp. 960; *Gordon v. Osk*, 56 Misc. 604, 107 N. Y. Supp. 660.

**1846 n. 121.** However, particular allegations, such as that defendant broker kept books of account of the transactions in question, may be alleged on information and belief. *Hotchkiss v. Levi*, 140 App. Div. 525, 125 N. Y. Supp. 462.

**1847 § 1449.** Where discovery of property other than books or the like is sought, it must be shown that the article or property is material to the decision of the action, or is competent evidence in the case, or an inspection is necessary to prepare for trial. *Beyer v. Transit Development Co.*, 139 App. Div. 724, 124 N. Y. Supp. 463. Must show which of the books sought to be inspected contains the information desired. *Moraff v. Kohn*, 135 N. Y. Supp. 689.

**1847 n. 130.** *Snyder v. De Forest Wireless Tel. Co.*, 113 App. Div. 840, 99 N. Y. Supp. 644. Affidavit held insufficient. *Hutchinson v. McCaddon*, 157 App. Div. 228, 141 N. Y. Supp. 809.

**1848 n. 131.** *Sivius v. Mooney*, 54 Misc. 66, 104 N. Y. Supp. 503; *Dannenberg v. Heller* is reported in the official series in 88 App. Div. 548.

**1848 n. 135.** See also *Brickner v. Sulzbacher*, 130 App. Div. 393, 114 N. Y. Supp. 958.

**1849 n. 139.** Allegations as to the actual existence of the documentary evidence must be made. *Memphis Trotting Ass'n v. Smathers*, 114 App. Div. 376, 99 N. Y. Supp. 1057.

**1852** § 1452. Order as *res judicata*, see *Memphis Trotting Ass'n v. Smathers*, 118 App. Div. 362, 103 N. Y. Supp. 498. Inspection of all of defendant's business books and papers should not be allowed where not necessary. *Funger v. Brooklyn Bottle Stopper Co.*, 132 App. Div. 837, 117 N. Y. Supp. 799. Scope of order, see *People v. American Ice Co.*, 120 App. Div. 234, 104 N. Y. Supp. 858; *People v. American Ice Co.*, 54 Misc. 67, 105 N. Y. Supp. 650.

**1853.** May permit taking of photographic copy of papers claimed to be forgeries. *Corbet v. Union Dime Savings Inst.*, 67 Misc. 175, 122 N. Y. Supp. 268. A party should not be compelled to produce a writing for inspection, at a photographer's studio, so that it may be photographed. The better practice is to direct that it be placed in the custody of the county clerk with permission to inspect and photograph it. *Beck v. Bohm*, 95 App. Div. 273, 88 N. Y. Supp. 584. Where the party whose books are desired to be inspected claims that the discovery is sought in bad faith, for ulterior purposes, the court should not direct that the inspection be conducted by plaintiff with the aid of a chartered accountant, and that the "defendants" pay the charges of the accountant. *Cohn v. Hessel*, 95 App. Div. 548, 88 N. Y. Supp. 1057.

**1853** n. 153. See *Caldwell v. Mutual Reserve Life Ins. Co.*, 114 App. Div. 377, 99 N. Y. Supp. 984, where inspection denied on condition that the opposing party stipulate to produce the books on the trial. Inspection of books and records of electric light company and examination of its plant held proper. *New York Edison Co. v. New York*, 133 App. Div. 728, 118 N. Y. Supp. 238.

**1853** n. 155. When requiring sworn statement to be furnished, insufficient relief, see *Pfaelzer v. Gassner*, 54 Misc. 579, 104 N. Y. Supp. 847.

**1853** n. 156. Books of account, in daily use, which cannot be taken from the place of business without serious incon-

venience, should not be ordered deposited with a referee, but the inspection should be permitted at the place of business. *Cohn v. Hessel*, 95 App. Div. 548, 88 N. Y. Supp. 1057.

**1856.** An answer should not be stricken out because of refusal to obey an order to produce books and papers, where excused. *Farrand v. Wittner*, 140 N. Y. Supp. 85.

**1856 n. 170a.** The refusal must be absolute and contumacious. *Banes v. Rainey*, 130 App. Div. 465, 114 N. Y. Supp. 986.

## CHAPTER VII

### INTERPLEADER ON MOTION

**1858 § 1453.** Laws 1908, c. 285, amends the Code by adding a new section to be § 820a and to read as follows: "When any sum of money shall be due and payable under or on account of a contract, and the whole, or any part thereof, exceeding fifty dollars in amount, shall be claimed or demanded by adverse claimants thereto, the debtor may bring suit in any court having jurisdiction thereof, and of the parties, demanding judgment of interpleader, and that the debtor be permitted to pay the amount of the debt into court, and that such debtor upon such payment into court be discharged from any further liability to any of the parties to the action. When service of the summons and complaint shall have been made upon all such claimants, the plaintiff may make application, by petition or upon affidavits for an order permitting and directing the plaintiff to pay the amount of the debt into court, and that the plaintiff, upon the payment into court of the amount of the debt as required by the order, be discharged from any further liability to any of the defendants in such action, and the court, upon satisfactory proof by affidavit or otherwise, as the court may require, of the facts alleged in the complaint, and that the whole or part of the debt is claimed adversely by the defendants without any

collusion on the part of the plaintiff, and that the amount thereof is not in dispute may make such an order, upon such terms as to costs and disbursements payable out of the money so adversely claimed as to the court may seem just, and upon the payment into court of the amount of such debt, and complying with the terms of such order, the plaintiff shall stand discharged from any further liability to any of the defendants in said action upon account of such debt and contract. Notice of such application, together with copies of the papers upon which the same is made, shall be personally served on each of the defendants, at least five, and not more than fifteen days before the return day thereof." Under § 820a of the Code, insurance company which brings an action of interpleader, on showing conflicting claims to money, is entitled to order to pay it into court. *Western Commercial Travelers Assoc. v. Langeheineken*, 139 App. Div. 592, 124 N. Y. Supp. 182. In action of interpleader, after interlocutory judgment is entered, a third person also claiming an interest in the fund may be allowed to intervene. *Edison Electric, etc., Co. v. Frick Co.*, 146 App. Div. 605, 131 N. Y. Supp. 125. City Court of New York has jurisdiction of action under § 820a of the Code; and allegation of collusion, where proofs are to contrary, is no ground for refusing order. *United States Mort. & T. Co. v. Vermilye & Power*, 72 Misc. 375, 130 N. Y. Supp. 303. Sufficiency of complaint in action of interpleader by warehouseman, see *Manhattan Storage & W. Co. v. Benjuiat Art Museum*, 155 App. Div. 196, 139 N. Y. Supp. 1073.

**1859** n. 6. *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281, 97 N. E. 731.

**1859** § 1454. Action by officer against city to recover salary is not an action on contract within this provision. *Walker v. New York*, 72 Misc. 97, 129 N. Y. Supp. 1059.

**1860** § 1455. In action by one partner, adverse partner may be interpleaded. *Siegel v. Goldstone*, 75 Misc. 469,



133 N. Y. Supp. 453. It must appear that the claim made by the person not a party has some reasonable foundation. *Hanna v. Manufacturers' Trust Co.*, 104 App. Div. 90, 93 N. Y. Supp. 304. Both as to action for interpleader and order therefor, it is necessary to show that the claimant will probably succeed. *Sulzberger v. Seklir*, 153 App. Div. 749, 138 N. Y. Supp. 691. Third person will not be interpleaded where if he obtains the fund he must pay it over to plaintiff. *Walker v. New York*, 72 Misc. 97, 129 N. Y. Supp. 1059.

1860 n. 12. Compare *Bowsky v. Cosby*, 106 App. Div. 572, 94 N. Y. Supp. 792. Where facts exist which would support a common-law action for interpleader, the Code substitute is proper. *Helene v. Corn Exch. Bank*, 96 App. Div. 392, 89 N. Y. Supp. 310.

1860 n. 13. See *Edwards v. Greenwich Savings Bank*, 109 N. Y. Supp. 721; *Boskowitz v. Boskowitz*, 124 App. Div. 849, 109 N. Y. Supp. 490.

1860 n. 14. *Mitchell v. Catlin & Powell Co.*, 71 Misc. 450, 128 N. Y. Supp. 692. Merely expressing an opinion that plaintiff's claim is not well founded does not show that defendant has disputed the claim. *Trembley v. Marshall*, 118 App. Div. 839, 103 N. Y. Supp. 680.

1860 n. 15. *Mitchell v. Catlin & Powell Co.*, 71 Misc. 450, 128 N. Y. Supp. 692; *Allen v. Quackenbush*, 48 Misc. 627, 96 N. Y. Supp. 198; *Michigan Sav. Bank v. Coy, Hunt & Co.*, 45 Misc. 40, 90 N. Y. Supp. 814.

1861 n. 19. *Olsen v. Moran*, 50 Misc. 655, 99 N. Y. Supp. 338.

1862 § 1456. It is ground for refusing order that claimant was a nonresident and could not be served within the state. *Bullowa v. Provident Life & Trust Co.*, 125 App. Div. 545, 109 N. Y. Supp. 1058.

1862 n. 30. But where a third person interposes a claim, in replevin, and defendant makes no claim whatever to the property, an interpleader will be granted but no direction will

be made as to the disposition of the property, pending the action where it is in the possession of the plaintiff pursuant to an undertaking given by him. *Wright Steam Engine Works v. N. Y. Kerosene Oil Engine Co.*, 44 Misc. 580, 90 N. Y. Supp. 130.

**1863** § 1457. Corporation sued on coupons of its bonds may interplead claimants. *Hirsch v. Military-Naval Co.*, 138 N. Y. Supp. 1076.

**1864** n. 46. *Dardonville v. Smith*, 133 App. Div. 234, 117 N. Y. Supp. 216; *Trembley v. Marshall*, 118 App. Div. 839, 103 N. Y. Supp. 680.

**1865** n. 50. *Natowitz v. Independent Order, etc.*, 149 App. Div. 607, 133 N. Y. Supp. 1065; *St. John v. Union Mutual Life Ins. Co.*, 132 App. Div. 515, 117 N. Y. Supp. 1077; *Lane v. Equitable Life Assur. Soc.*, 102 App. Div. 470, 92 N. Y. Supp. 877. By interpleading an adverse claimant, the company eliminates all question as to the validity of the policy and the designation of the beneficiary. *Sangunitto v. Goldey*, 88 App. Div. 78, 84 N. Y. Supp. 989. Not where he is a nonresident and cannot be personally served within the state. *Bullowa v. Provident Life & Trust Co.*, 125 App. Div. 545, 109 N. Y. Supp. 1058. Not where there is no merit in the third person's claim. *Fowler v. Harvey G. Eastman Council*, 58 Misc. 14, 108 N. Y. Supp. 1017.

**1865** n. 55. This statute has no application where persons claiming the funds in litigation have only a future interest and not a present right to the funds. *Gifford v. Oneida Sav. Bank*, 99 App. Div. 25, 90 N. Y. Supp. 693. The City Court of New York may grant the order. *Gottschall v. German Sav. Bank*, 45 Misc. 27, 90 N. Y. Supp. 896.

**1866.** Motion and not order to show cause is the proper procedure. *Bullowa v. Provident Life & Trust Co.*, 125 App. Div. 545, 109 N. Y. Supp. 1058.

**1866** § 1459. Where the motion, made before issue joined,

is granted but no order finally adjudicating the motion is entered, it is questionable whether defendant's time to plead is not suspended. *Michigan Sav. Bank v. Coy, Hunt & Co.*, 45 Misc. 40, 90 N. Y. Supp. 814.

**1866** n. 58. Rule does not apply where claimant is made a party on his own application after answer served by the original defendant. *Best v. New York City Waterfront Co.*, 158 App. Div. 555, 143 N. Y. Supp. 814.

**1866** n. 62. *O'Connor v. Lock*, 148 App. Div. 765, 133 N. Y. Supp. 320.

**1866** § 1461. Must be showing as to want of collusion. *O'Connor v. Lock*, 148 App. Div. 765, 133 N. Y. Supp. 320.

**1867** n. 67. Mere assertion of claim of another is insufficient. *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281, 97 N. E. 731.

**1868.** The Code nowhere prescribes the procedure to be followed after the entry of an order of interpleader. It is, however, now well settled that such procedure should, as far as practicable, be that adopted by courts of equity in cases of interpleader in analogous cases. Leave to serve a supplemental complaint should be sought as provided for by section 544 of the Code. The supplemental complaint should contain substantially the allegations of the former complaint and such further allegations as may be necessary to show the facts preceding the making of the order of interpleader, showing the substitution of the present defendant in place of the original defendant, and the latter's discharge from liability upon his deposit in court of the amount of the debt or the delivery of the property, and the compliance with all the provisions of the order of interpleader. The complaint should also demand judgment that the plaintiff is entitled to the amount so deposited or the property specified in the complaint, and that he recover the costs of the action. Within the time prescribed by law to answer a complaint, the substituted defendant should answer the supplemental

complaint, and thus present the issues to be tried. If the substituted defendant fails to plead or to obtain an extension of the time to plead, plaintiff may enter judgment and apply to the court for an order directing the payment to him of the money on deposit. *Greenblatt v. Mendelsohn*, 46 Misc. 554, 92 N. Y. Supp. 963. Consent of the substituted defendant to the granting of the order of interpleader is an appearance and submission to the jurisdiction of the court which makes the service of a summons unnecessary. *Id.* Objections to the service of a supplemental complaint without leave of court are waived by admitting "due and timely service" thereof. *Id.*

**1868** § 1462. Order bringing in person claiming under an assignment should not also bring in assignors of claimants not questioning the assignment. *Barnett v. Typermass & Co.*, 133 N. Y. Supp. 454. Order in replevin, see *O'Connor v. Lock*, 148 App. Div. 765, 133 N. Y. Supp. 320.

**1869.** The court, on discharging an insurance society from liability for the proceeds of a policy, claimed by several persons, on its payment of such proceeds into court, should not award costs to such society, to be deducted from such proceeds. *Lane v. Equitable Life Assur. Soc.*, 102 App. Div. 470, 92 N. Y. Supp. 877.

**1869** n. 79. *Vandewater v. Mutual Reserve Life Ins. Co.*, 44 Misc. 316, 89 N. Y. Supp. 845. See also *Bowsky v. Cosby*, 106 App. Div. 572, 94 N. Y. Supp. 792. But see *Satkofsky v. Jarmulowsky*, 49 Misc. 624, 97 N. Y. Supp. 357. The case of *Wells v. Corn Exch. Bank* is reported in 43 Misc. 377. This case is followed in *Marcus v. Aufses*, 94 N. Y. Supp. 397, and *Krugman v. Hanover Fire Ins. Co.*, 94 N. Y. Supp. 399, which hold that inasmuch as the granting of the motion in the City Court of New York City would oust said court of jurisdiction, because it has no jurisdiction over equitable actions, the motion should be refused. The latter case follows the

rule under protest and presents good reasons why the contrary rule should prevail. In City Court of New York City the case is then triable without a jury at any trial term when regularly reached on the calendar. *Schreiber v. Dry Dock Savings Institution*, 59 Misc. 408, 112 N. Y. Supp. 360.

**1869** n. 81. Deposit of documentary evidence held by defendant required. *Callahan v. Supreme Tent of K. of M.*, 121 N. Y. Supp. 354.

**1870** § 1463. See *Helene v. Corn Exch. Bank*, 96 App. Div. 392, 89 N. Y. Supp. 310.

## CHAPTER VIII

### LEAVE TO SUE OR DEFEND AS A POOR PERSON

**1873** § 1465. It seems that leave may be granted to one suing as an executor or administrator. *Matter of Cannice*, 52 Misc. 6, 101 N. Y. Supp. 1054.

**1874** § 1466. Under Code amendments (*ante*, **570** n. 11) application may be on affidavit.

**1874** n. 17a. The last two cases cited in the note, which are contrary to the rule laid down in the text, are followed in *Larsen v. Interurban St. R. Co.*, 97 App. Div. 150, 89 N. Y. Supp. 649, which holds that there is no distinction between cases where the guardian ad litem is the father and those where some other person has been appointed to act.

**1875**. Consent of attorney to act without compensation must be one of the motion papers. *Traver v. Jackman*, 98 App. Div. 287, 90 N. Y. Supp. 739.

**1875** nn. 22, 25. *Traver v. Jackman*, 98 App. Div. 287, 90 N. Y. Supp. 739.

**1878** n. 44. *Matter of Cannice*, 52 Misc. 6, 101 N. Y. Supp. 1054.

**1878** n. 45. But application is stayed by nonpayment of costs awarded on appeal from a special order. *Brangaccio*

v. Weber Piano Co., 143 App. Div. 612, 128 N. Y. Supp. 467.

**1878 n. 46.** The attorney is entitled, however, to the statutory costs, and hence a consent to act "without compensation except the statutory costs" is sufficient. *Malkin v. Postal Typewriter Co.*, 95 App. Div. 205, 88 N. Y. Supp. 403.

**1879 n. 48.** A contract for a contingent fee is unenforceable. *Matter of Tyndall*, 117 App. Div. 294, 102 N. Y. Supp. 211.

## CHAPTER IX

### SECURITY FOR COSTS

**1884 n. 12.** Where a plaintiff has already given a bond in replevin under section 1699 of the Code he cannot be compelled to give an additional undertaking to secure the costs. *Vulcanite Portland Cement Co. v. Williams*, 46 Misc. 405, 92 N. Y. Supp. 574.

**1884 n. 13.** That parties who intervene as defendants cannot be compelled to give security for costs, see *Riley v. Ryan*, 45 Misc. 151, 91 N. Y. Supp. 952.

**1885 n. 17.** It is immaterial that the order was not served. *Buccolo v. New York Life Ins. Co.*, 117 App. Div. 423, 102 N. Y. Supp. 794.

**1885 n. 18.** The County Courts of Albany and Rensselaer Counties are added, by amendment in 1910, to the list of counties in which security may not be required in County Courts because of nonresidence. Rule applied to resident of Brooklyn, in action in City Court of New York. *Brassack v. Interborough Rapid Transit Co.*, 66 Misc. 189, 121 N. Y. Supp. 216, 2 Civ. Pro. (N. S.) 48. It is immaterial that defendant is a nonresident. *Craig v. W. & G. DuCros*, 63 Misc. 524, 117 N. Y. Supp. 384. Whether the word "city" as used in reference to New York City means the

entire city as now constituted or the original city as it existed prior to the last consolidation, *quere*. *Pelz v. Roth*, 46 Misc. 419, 92 N. Y. Supp. 263.

**1886.** Resident guardian ad litem for nonresident infant plaintiffs cannot be compelled to give security as a matter of right. *Crossett v. Dean*, 69 Misc. 69, 124 N. Y. Supp. 916. The mere fact of being out of the state temporarily does not constitute the person a nonresident. Thus, where the plaintiff was domiciled in this state at the time of the commencement of the action and for a considerable prior period, having a residence in Brooklyn, but for a few weeks, in order to receive care for her injuries, she had been stopping temporarily with an uncle in Jersey City, and such sojourn included the date when the action was commenced, but her household effects remained at her residence in Brooklyn, and she had returned to actually live in Brooklyn before the determination of the motion, she was not a nonresident. *Taylor v. Norris*, 104 App. Div. 21, 93 N. Y. Supp. 356.

**1887 n. 37.** Place where one is regularly employed and where he goes every business day is a place or office for the regular transaction of business. *Brassack v. Interborough Rapid Transit Co.*, 66 Misc. 190, 121 N. Y. Supp. 215, 2 Civ. Pro. (N. S.) 57. "A dock laborer, employed on a wharf by the hour, whose employment had ceased by reason of the injuries for which this action is brought, and who at the time when the summons was served had no employment in the city, but simply a reasonable expectation of re-employment, because his name was still retained on the list of employés, can in no way be described as a person who has an office or place for the regular transaction of business." *Crow v. New York Transp. Co.*, 64 Misc. 34, 117 N. Y. Supp. 947.

**1887 n. 39.** Since enactment of § 1836a of the Code, a nonresident administrator who sues here in his representative capacity may be compelled to give security the same as if

he was a nonresident individual. *Smiley v. Finucane*, 134 N. Y. Supp. 59.

1888 n. 48. *Kiendl v. Dubroff*, 136 App. Div. 8, 120 N. Y. Supp. 121.

1888 n. 49. *Riker v. Gwynne*, 116 N. Y. Supp. 10.

1890 § 1471. Resident guardian ad litem for nonresident infant plaintiffs will not be required to give security, in the exercise of discretion, where it seems needless and vexatious. *Crossett v. Dean*, 69 Misc. 69, 124 N. Y. Supp. 916.

1891 n. 62. But see *McKeaggan v. Post & McCord*, 117 App. Div. 129, 102 N. Y. Supp. 276; *Myers v. Stephens*, 52 Misc. 632, 102 N. Y. Supp. 929.

1891 n. 64. In action by nonresident executrix, security is properly ordered although decedent left a bank deposit in this state. *Schmalz v. Crow Const. Co.*, 146 App. Div. 623, 131 N. Y. Supp. 398.

1892 n. 68. *Meaney v. Post & McCord*, 117 App. Div. 563, 102 N. Y. Supp. 611. See also *Mills v. Nassau Bank of City of New York*, 123 App. Div. 514, 108 N. Y. Supp. 559; *Hilgenberg v. Great Eastern Casualty, etc., Co.*, 144 App. Div. 411, 129 N. Y. Supp. 240.

1893 n. 79. It is necessary, in addition to the fact of insolvency, to show that the action was brought in bad faith or heedlessly, or that the plaintiff will probably not succeed. *De La Fleur v. Barney*, 45 Misc. 515, 92 N. Y. Supp. 926.

1894. Assignee for benefit of creditors may be required to give security, where he has no assets except the claim in suit. *Graham v. Ashenbach*, 136 App. Div. 447, 120 N. Y. Supp. 882. Where bonds were assigned to an irresponsible person solely to enforce collection and the trustee who brought the action had no property, security was properly required. *Hagar v. William Radam Microbe Killer Co.*, 119 App. Div. 839, 104 N. Y. Supp. 896.

1896 n. 98. *Nimcke v. New York, etc., Pub. Co.*, 133 N. Y.



Supp. 1075; *United States v. Bangs*, 134 App. Div. 215, 118 N. Y. Supp. 936 (at least in the first and second judicial departments); *Cannon v. New York City R. Co.*, 52 Misc. 633, 103 N. Y. Supp. 997. So held in first department. *Nassar v. Elias*, 115 N. Y. Supp. 106. Facts excusing delay, see *Knaggs v. Easton*, 54 Misc. 51, 38 Civ. Proc. R. 485, 104 N. Y. Supp. 508. Motion made after cause set for trial is too late, where no excuse for the delay is offered. *United States v. Bangs*, 134 App. Div. 215, 118 N. Y. Supp. 936.

1897 n. 99. *Smiley v. Finucane*, 134 N. Y. Supp. 59; *Nimcke v. New York, etc., Pub. Co.*, 133 N. Y. Supp. 1075. Agreements between attorneys may excuse laches. *Di Stefano v. Peekskill Lighting, etc., Co.*, 149 App. Div. 745, 134 N. Y. Supp. 204. The right to demand security is not waived by answering the complaint without moving therefor, where afterwards the complaint and summons is amended so as to change the action to one against defendant personally instead of as trustee. *Boyd v. United States Mortg. & Trust Co.*, 90 App. Div. 32, 85 N. Y. Supp. 589.

1897 n. 100. *Nimcke v. New York, etc., Pub. Co.*, 133 N. Y. Supp. 1075; *Fabrik Schiller'scher Verschlusses Actien Gesellschaft v. Nease*, 117 App. Div. 379, 102 N. Y. Supp. 672. No laches in discovering bankruptcy of plaintiff who became a bankrupt after the joinder of issues, see *Donnelly v. Third Ave. R. Co.*, 112 App. Div. 648, 98 N. Y. Supp. 387. The motion may be denied for laches where not made until a year and a half after service of the complaint, though made before answering, where, in the interim, the defendant's time to answer has repeatedly been enlarged by successive stipulations, and when the condition which would have entitled the defendant to security, if he had moved promptly, no longer exists. *Gibbons v. Bush Co.*, 98 App. Div. 283, 90 N. Y. Supp. 603.

1897 n. 106. *Mills v. Nassau Bank of City of New York*, 123 App. Div. 514, 108 N. Y. Supp. 559.

**1898 n. 110.** Where the motion is addressed to the discretion of the court, it will be denied where the granting of it would compel appellant to abandon his appeal. *Cowen v. Rouss*, 49 Misc. 338, 99 N. Y. Supp. 302. See also *infra*, **1906 § 1475**.

**1899 n. 115.** *Cannon v. New York City R. Co.*, 52 Misc. 633, 103 N. Y. Supp. 997.

**1899 n. 117.** Where plaintiff is both a nonresident and an administrator, notice is necessary. *Baum v. Morse Dry Dock & Repair Co.*, 160 App. Div. 14, 145 N. Y. Supp. 127.

**1900 n. 121.** An affidavit that plaintiff had no office within the limits of the borough of Manhattan, without referring to the borough of the Bronx, is insufficient. *Pelz v. Roth*, 46 Misc. 419, 92 N. Y. Supp. 263.

**1901 n. 128.** Order for security in double the amount authorized by the Code (\$250) is irregular. *Di Stefano v. Peekskill Lighting, etc., Co.*, 149 App. Div. 745, 134 N. Y. Supp. 204.

**1902 § 1473.** Stay of proceedings as waived by not returning insufficient undertaking, see *Stuart v. Spofford*, 122 App. Div. 47, 106 N. Y. Supp. 903.

**1903 n. 141.** *Perrin v. Whipple*, 118 N. Y. Supp. 1048.

**1906 § 1475.** Where security for \$250 given, and then further security for \$750 is furnished as required, it is improper to require still further security merely because the costs have grown to a large sum and the solvency of a surety on a former bond is doubtful. *Kliger v. Rosenfeld*, 144 App. Div. 571, 129 N. Y. Supp. 782, 1130. Additional security may be required to pay costs already accrued or entered in a judgment as well as those that may thereafter accrue. *Banes v. Rainey*, 192 N. Y. 286, 85 N. E. 71 [reversing 124 App. Div. 583, 109 N. Y. Supp. 140]. By accepting an undertaking given in advance of the entry of an order for security, but after service of notice of motion for security, and omitting to require plaintiff to give a new undertaking

in the same form and for the same amount after the order was actually filed, defendant does not thereby waive his right to additional security. *Banes v. Rainey*, 192 N. Y. 286, 85 N. E. 71 [reversing 124 App. Div. 583, 109 N. Y. Supp. 140].

**1906 n. 161.** This does not authorize such an order after judgment entered against plaintiff for costs after dismissal of the complaint, notwithstanding an appeal has been taken. *Schroeder v. Page*, 124 App. Div. 253, 108 N. Y. Supp. 721.

**1907 n. 167.** The order may be made while an appeal from the judgment is pending. *Bender v. Paulus*, 109 App. Div. 148, 95 N. Y. Supp. 670; *Banes v. Rainey*, 192 N. Y. 286, 85 N. E. 71 [reversing 124 App. Div. 583, 109 N. Y. Supp. 140, holding that where, after a nonresident plaintiff had given security for costs, judgment was entered dismissing complaint from which plaintiff appealed, a subsequent order requiring plaintiff to give additional security was improper].

**1907 n. 169.** An additional undertaking may be ordered for an amount in excess of \$250. *Banes v. Rainey*, 192 N. Y. 286, 85 N. E. 71 [reversing on other grounds 124 App. Div. 583, 109 N. Y. Supp. 140].

**1907 n. 169a.** Contra. Additional undertaking may be required although original undertaking was voluntarily given. *Banes v. Rainey*, 192 N. Y. 286, 85 N. E. 71 [reversing 124 App. Div. 583, 109 N. Y. Supp. 140, and overruling dicta to the contrary in *Duuk v. Duuk*, 177 N. Y. 264, 69 N. E. 539].

**1908 n. 170.** Code provision does not apply where default is in furnishing security required after interlocutory judgment. *Kliger v. Rosenfeld*, 144 App. Div. 571, 129 N. Y. Supp. 782, 1130. Such judgment is not appealable to the Appellate Division. *Jones v. Sabin*, 122 App. Div. 666, 107 N. Y. Supp. 508.

## CHAPTER X

## STAY OF PROCEEDINGS

**1912 n. 16a.** *Wells v. Bushe*, 118 N. Y. Supp. 486. The court has inherent power to perpetually stay a suit where the only effect of continuing it would be to subject defendants to the annoyance, danger, and expense of protecting themselves from groundless, vexatious, and harassing litigation. *Wells v. Bushe*, 118 N. Y. Supp. 486.

**1912 n. 17.** *Behrens v. Sturges*, 138 App. Div. 537, 123 N. Y. Supp. 224; *Singer v. Garlick*, 123 App. Div. 282, 107 N. Y. Supp. 972; *Muratore v. Pirkel*, 109 App. Div. 146, 95 N. Y. Supp. 855; *Loftus v. Straight Line Engine Co.*, 111 App. Div. 718, 97 N. Y. Supp. 790; *Ingrosso v. Baltimore & O. R. Co.*, 105 App. Div. 494, 94 N. Y. Supp. 177. The rule does not apply where the first action was in equity and the second at law on grounds not constituting a right of action in equity. *Maass v. Rosenthal*, 62 Misc. 350, 115 N. Y. Supp. 4. Financial inability to pay the costs is no excuse. *Lincoln v. N. Y. Central, etc., R. R. Co.*, 121 N. Y. Supp. 1; *Weil v. Manheim*, 66 Misc. 565, 121 N. Y. Supp. 1114.

**1913.** Supreme Court may stay proceedings in an action in Municipal Court for failure to pay costs of former action which was dismissed. *Hempsted v. White Serving Mach. Co.*, 134 App. Div. 575, 119 N. Y. Supp. 620. Husband who lost his divorce suit cannot interpose the same acts as a counterclaim in his wife's action for separation, until he has paid the costs of the former action, although the stay should not prevent his defense. *Hasse v. Hasse*, 149 App. Div. 775, 134 N. Y. Supp. 83.

**1913 n. 20.** *Behrens v. Sturges*, 138 App. Div. 537, 123 N. Y. Supp. 224. But see *Merchants Credit Clearing House Assoc. v. Dennis*, 143 App. Div. 170, 127 N. Y. Supp. 1014.

**1913 n. 21.** Tuthill v. Forbes, 160 App. Div. 510, 145 N. Y. Supp. 660.

**1913 n. 22.** Hoeffe v. American Laundry Machinery Mfg. Co., 161 App. Div. 679, 146 N. Y. Supp. 1094.

**1914 n. 27.** First action at common law, while second under Employers' Liability Act. Lass v. Volk Housewrecking Co., 72 Misc. 62, 129 N. Y. Supp. 150.

**1914 n. 31.** Brinkman v. Borden's Condensed Milk Co., 126 N. Y. Supp. 668. So the rule applies where the first action is dismissed for want of prosecution. Conlon v. National Fireproofing Co., 128 App. Div. 270, 112 N. Y. Supp. 652.

**1914 n. 32.** Murphy v. Mundorff, 69 Misc. 334, 125 N. Y. Supp. 624.

**1915.** If costs of an appeal from an order are not paid, subsequent proceedings are stayed, and the court cannot vacate the stay nor grant leave to sue as a poor person. Muller v. Brooklyn Heights Railroad Co., 139 App. Div. 727, 124 N. Y. Supp. 491.

**1915 n. 40.** Brangaccio v. Weber Piano Co., 143 App. Div. 612, 128 N. Y. Supp. 467. Waiver of stay, see Geneva Mineral Springs Co. v. Steele, 81 Misc. 416, 143 N. Y. Supp. 331. "It is only when interlocutory costs are awarded in an action in which issues of law and issues of fact have been joined that the non-payment of interlocutory costs under the provisions of sections 3232 and 3233 of the Code has the effect of staying proceedings." Will v. Barnwell, 64 Misc. 641, 118 N. Y. Supp. 1003. Interlocutory costs awarded upon an issue of law, where an issue of fact remains undisposed of, stay all proceedings on the part of the party required to pay the same, except to review or vacate the order or judgment, without further direction of the court, until the payment thereof, the same as costs of a motion. Bigelow v. Drummond, 109 App. Div. 132, 95 N. Y. Supp. 1027. The stay does not begin to operate until the order has been

served on the party required to pay the costs, irrespective of whether the time for the payment of such costs is specified in the order. *Sire v. Shubert*, 93 App. Div. 324, 87 N. Y. Supp. 891. Where the County Court reverses, with costs, a judgment for plaintiff, and grants a new trial before a designated justice of the peace, this Code provision does not apply so as to preclude a new trial before the payment of the costs of reversal. *Smith v. Cayuga Lake Cement Co.*, 105 App. Div. 307, 93 N. Y. Supp. 959. Failure to pay the costs of a reversal, where not imposed as the condition of granting a new trial, but entered as a part of the judgment, is not a ground for a stay. *Id.*

1915 n. 43. *Hill v. Muller*, 53 Misc. 262, 103 N. Y. Supp. 96.

1915 n. 44. *Goldberg v. Wood*, 50 Misc. 618, 98 N. Y. Supp. 200. The exclusion of the defendants from participation in the trial because of the nonpayment of costs, imposed as terms for continuance, is without warrant in law. *Farber v. Flauman*, 30 Misc. 627, 62 N. Y. Supp. 784; *Pfeiffer v. Joline*, 114 N. Y. Supp. 219. May serve an answer. *Thompson v. McLaughlin*, 138 App. Div. 711, 123 N. Y. Supp. 762. Does not prevent proof of counterclaim where available only as a defense. *Rindskoff v. Zimmer*, 84 Misc. 32, 145 N. Y. Supp. 984.

1915 n. 45. A motion by defendant to compel the acceptance of an amended answer is not stayed by the failure to pay the costs of a prior motion. *Tracy v. Lichtenstadter*, 113 App. Div. 754, 99 N. Y. Supp. 331. Entry of order and an appeal therefrom are not stayed by the failure to pay the costs. *Allen v. Becket*, 84 N. Y. Supp. 1011.

1915 n. 46. *Jacobs v. Mexican Sugar Refining Co.*, 45 Misc. 56, 90 N. Y. Supp. 824.

1915 n. 47. Costs of an appeal from an order are "costs of a motion." *Wesserman v. Benjamin*, 91 App. Div. 547, 86 N. Y. Supp. 1022; *Cohen v. Krulewitch*, 81 App. Div. 147, 80 N. Y. Supp. 689.

**1916.** The inherent power of the court to stay proceedings or control the trial of an action is one which must be exercised in the action itself, and, where it is sought to enjoin parties from proceeding in another action, such relief must be by injunction in an action where by formal prayer it is demanded. It is not permissible to apply in an action brought for an entirely different purpose, to stay the trial of another action. *David Belasco Co. v. Klaw*, 98 App. Div. 74, 90 N. Y. Supp. 593. That plaintiffs in the second action who were defendants in the original action could have set up their cause of action as a counterclaim in the first action does not require the granting of a stay. *Jones v. Leopold*, 95 App. Div. 404, 88 N. Y. Supp. 568; *Ogden v. Pioneer Iron Works*, 91 App. Div. 394, 86 N. Y. Supp. 955. In action in Supreme Court for breach of contract, another action brought in the Municipal Court of New York City by defendant for breach of the same contract. *International Post Card Co. v. Lithograph, etc., Co.*, 144 App. Div. 72, 128 N. Y. Supp. 780. Stay granted pending a suit in England. *Oppenheimer v. Carabaya Rubber & N. Co.*, 145 App. Div. 830, 835, 130 N. Y. Supp. 587, 590.

**1916 n. 48.** See *Cohn v. Suderov*, 160 App. Div. 916; *Shattuck v. Guardian Trust Co.*, 123 App. Div. 406, 107 N. Y. Supp. 1043. Especially is this so where the earlier proceeding has ripened into a judgment, and it is immaterial that the judgment has been stayed pending appeal. In *re Moran*, 59 Misc. 133, 112 N. Y. Supp. 207. A defendant need not set out a cause of action as a counterclaim, and where he merely sets up a general denial, his prior action on the counterclaim should not be stayed. *Walkup v. Mesick*, 110 App. Div. 326, 97 N. Y. Supp. 142. The motion should not be granted where the action sought to be stayed is entitled to a preference on the calendar while the prior action is not, especially where the question is one of public importance and a speedy determination is desirable. *City of New York*

v. Interborough Rapid Transit Co., 109 App. Div. 596, 96 N. Y. Supp. 314.

**1916 n. 50.** But see *De La Vergne Mach. Co. v. New York & Brooklyn Brewing Co.*, 125 App. Div. 649, 110 N. Y. Supp. 24 (holding that the issues and parties need not be identical in all respects).

**1916 n. 51.** See also *New York v. Interborough Rapid Transit Co.*, 109 App. Div. 596, 96 N. Y. Supp. 314.

**1916 n. 52.** *Church of Transfiguration v. St. Stephen's Church*, 135 App. Div. 501, 120 N. Y. Supp. 422; *Curlette v. Olds*, 110 App. Div. 596, 97 N. Y. Supp. 144. See also *Ryan v. Benjamin*, 128 App. Div. 51, 112 N. Y. Supp. 441. Proceedings in action brought for different relief cannot be stayed. *North Central Realty Co. v. Blackman*, 145 App. Div. 199, 129 N. Y. Supp. 1005.

**1917 n. 55.** *Levy v. Greenberg*, 71 Misc. 180, 129 N. Y. Supp. 900; *Gibbs v. Kahn*, 71 Misc. 177, 128 N. Y. Supp. 253. Stay of action for work and materials pending suit to foreclose mechanic's lien, see *Teeman v. Lustbader*, 55 Misc. 535, 105 N. Y. Supp. 941.

**1918 n. 64.** A stay should not be granted where the actions are between different parties, for different causes, and the determination of one will not dispose of the other. *Jenkins v. Baker*, 91 App. Div. 400, 86 N. Y. Supp. 958.

**1919 n. 70.** See also *Curlette v. Olds*, 110 App. Div. 596, 97 N. Y. Supp. 144.

**1920 n. 77.** But the filing of an involuntary petition in bankruptcy against plaintiff does not authorize a stay on his motion. *Berkeley v. Dusenberry*, 144 App. Div. 499, 129 N. Y. Supp. 836.

**1921.** Application should be based on notice. *Delahunty v. Canfield*, 106 App. Div. 386, 94 N. Y. Supp. 815.

**1921 n. 86.** Motion must be made in action sought to be stayed. *Johnson v. Victoria Chief Copper Mining & Smelting Co.*, 60 Misc. 464, 113 N. Y. Supp. 1021. Especially is



this so where other action is not for an injunction. *Gilroy v. Everson Hickok Co.*, 120 App. Div. 207, 105 N. Y. Supp. 188.

1921 n. 86. *Raymore Realty Co. v. Pfothenhauer-Nesbit Co.*, 139 App. Div. 126, 123 N. Y. Supp. 875. Necessary so to do where actions in different courts. *Grammer v. Greenbaum*, 146 App. Div. 3, 130 N. Y. Supp. 569.

1921 n. 88. But see ante, 560 § 545.

1921 n. 88a. *International Post Card Co. v. Lithograph, etc., Co.*, 144 App. Div. 72, 128 N. Y. Supp. 780; *Raymore Realty Co. v. Pfothenhauer-Nesbit Co.*, 139 App. Div. 126, 123 N. Y. Supp. 875.

1921 n. 89. But see ante, 560 § 545.

1921 n. 90. The motion may be made after the service of an amended answer. *Loftus v. Straight Line Engine Co.*, 111 App. Div. 718, 97 N. Y. Supp. 790. Denied where not made until case put on day calendar for trial. *Gertler v. Brooklyn, etc., R. Co.*, 128 N. Y. Supp. 618.

1922. If stay granted on condition of filing undertaking, and the sureties fail to justify, the stay is inoperative. *State Bank v. Wilchinsky*, 65 Misc. 162, 119 N. Y. Supp. 131.

1922 n. 93. *De La Vergne Mach. Co. v. New York & Brooklyn Brewing Co.*, 125 App. Div. 649, 110 N. Y. Supp. 24.

1922 § 1480. See also ante 1808, § 1398.

1924 n. 106. *Schwehm v. Hinberg*, 63 Misc. 525, 117 N. Y. Supp. 321.

## CHAPTER XI

### CHANGE OF PLACE OF TRIAL

1929 § 1485. Serving cross notice of trial, withdrawn three days later, is not a waiver where not prejudicial to opposing party. *Jacina v. Lemmi*, 155 App. Div. 397, 139 N. Y. Supp. 1034.

1930 n. 16. *Mills & Gibb v. Starin*, 119 App. Div. 336, 104 N. Y. Supp. 230.

**1930 § 1487.** On a motion by defendant to change the place of trial to the county in which he resides, where the venue is laid in a county in which neither party resides, it is improper, against defendant's objections, to change the place of trial to the county of plaintiff's residence. *Ferrin v. Huxley*, 94 App. Div. 211, 87 N. Y. Supp. 1005. The trial should not be changed to a county in which neither of the parties nor any of the witnesses reside unless the circumstances are so unusual that the ends of justice so require. *Kavanaugh v. Mercantile Trust Co.*, 94 App. Div. 575, 88 N. Y. Supp. 113.

**1930 § 1489.** Change should not be granted where plaintiff has moved into county in which venue is laid, in good faith and intending to make it his permanent voting residence. *Gilmartin v. Fuller Co.*, 147 App. Div. 697, 132 N. Y. Supp. 553.

**1931 n. 20.** *Finch School v. Finch*, 144 App. Div. 687, 129 N. Y. Supp. 1; *Lageza v. Chelsea Fibre Mills*, 135 App. Div. 731, 119 N. Y. Supp. 906 [citing *Nichols' Pr.*].

**1931 § 1490.** Is ground. *Upjohn v. First M. E. Soc.*, 156 App. Div. 147, 140 N. Y. Supp. 1104; *Lewis v. Town of Bethel*, 156 App. Div. 894, 140 N. Y. Supp. 1041; *Orkin v. Machan*, 148 App. Div. 197, 132 N. Y. Supp. 1003; *Belden v. Schapiro*, 138 App. Div. 669, 123 N. Y. Supp. 53; *Solberg v. Fort Orange Const. Co.*, 142 N. Y. Supp. 228; *Maucher v. Hedges*, 131 N. Y. Supp. 1008. Will be changed to county where cause of action arose and where most of the witnesses reside. *Fluckiger v. Haber*, 144 App. Div. 65, 128 N. Y. Supp. 740; *Spanedda v. Murphy*, 144 App. Div. 58, 128 N. Y. Supp. 884; *Kaufman v. Kaufman*, 152 App. Div. 99, 100, 136 N. Y. Supp. 592, 594; *Red Hook Light, etc., Co. v. Rightmyer*, 150 App. Div. 663, 135 N. Y. Supp. 725; *Mayer v. Madigan*, 150 App. Div. 519, 135 N. Y. Supp. 510; *Orkin v. Machan*, 148 App. Div. 197, 132 N. Y. Supp. 1003; *Neiman v. Gardner*, 145 App. Div. 197, 129 N. Y. Supp. 913.

Where most of disinterested and material witnesses lived in the county where the venue was laid, motion denied. *Burroughs v. Foster*, 145 App. Div. 702, 130 N. Y. Supp. 530. Where all of witnesses, except possibly one, reside in county where plaintiff resides, or in county where defendant resides and where the cause of action arose, change should be granted to one of such counties. *Shapiro v. Klar*, 136 App. Div. 91, 120 N. Y. Supp. 627. Changed for convenience of seven against four. *Solberg v. Fort Orange Const. Co.*, 142 N. Y. Supp. 28. Five witnesses for defendant outside county against none for plaintiff within county requires granting of motion. *Hemenway v. Fitzgerald*, 159 App. Div. 748, 144 N. Y. Supp. 951. Where plaintiff's only witnesses in the county are experts, change should be granted. *Van Alstine v. Burt*, 155 App. Div. 81, 135 N. Y. Supp. 779. That moving attorney boasted that his client would obtain an advantage is not ground for denying the motion. *Newgold v. Weller Bottling Works*, 143 App. Div. 381, 128 N. Y. Supp. 499. Where the answer is confusing and the issues are in doubt, a change will not be granted since the materiality of defendant's witnesses cannot be determined. *Hurley v. Roberts*, 117 App. Div. 837, 102 N. Y. Supp. 963. "It has never been held that the court will not consider the convenience of employee witnesses in determining where the place of trial should be held. It is undoubtedly true that their convenience will be less considered than the convenience of witnesses who are not in any way connected with the parties." *Neeley v. Erie R. Co.*, 134 App. Div. 781, 783, 119 N. Y. Supp. 953. Convenience of witnesses who are employees of defendant is properly considered. *Deutsch v. Upton Cold Storage Co.*, 146 App. Div. 588, 131 N. Y. Supp. 273. The convenience of witnesses in the employ of a party will not be given the same weight as that of other witnesses. *Hays v. Faatz-Reynolds Felting Co.*, 112 App. Div. 487, 98 N. Y. Supp. 386. A condition imposed by an

order denying a motion to change the place of trial that plaintiffs should admit the signatures to certain documents held by defendants is not effective to destroy the necessity of witnesses, since a party should not be compelled, before trial on such a motion, to disclose his evidence to his adversary. *Nichols v. Riley*, 112 App. Div. 102, 98 N. Y. Supp. 346.

**1932 n. 25.** See *Fuchs v. Fitzner*, 125 App. Div. 917, 109 N. Y. Supp. 1024.

**1932 n. 29.** *Brady v. Hogan*, 117 App. Div. 898, 102 N. Y. Supp. 962.

**1932 n. 30.** See also *Mills v. Sparrow*, 131 App. Div. 241, 115 N. Y. Supp. 629.

**1933 n. 33.** *Newgold v. Weller Bottling Works*, 143 App. Div. 381, 128 N. Y. Supp. 499. See *Neeley v. Erie R. R. Co.*, 134 App. Div. 781, 119 N. Y. Supp. 953; *Ludlow v. John Single Paper Co.*, 132 App. Div. 601, 116 N. Y. Supp. 1095.

**1933 n. 34.** *Shaff v. Rosenberg*, 116 App. Div. 366, 101 N. Y. Supp. 892. See also *Pattison v. Hines*, 105 App. Div. 282, 93 N. Y. Supp. 1071; *Lufty v. Sullivan*, 119 App. Div. 506, 104 N. Y. Supp. 177.

**1934 n. 38.** It is no answer to say that because of facilities for transportation it is as convenient for witnesses to go to New York City as to county seat of Suffolk. *Lambert Snyder Co. v. Smith*, 124 App. Div. 412, 108 N. Y. Supp. 992.

**1934.** That defendant cannot try the action in the county where the venue is laid, without serious injury to its business, is a matter to be considered. *Deutsch v. Upton Cold Storage Co.*, 146 App. Div. 588, 131 N. Y. Supp. 273.

**1934 n. 40.** *Van Alstyne v. Burt*, 151 App. Div. 81, 135 N. Y. Supp. 779; *Schulz v. Hudson Valley R. Co.*, 147 App. Div. 788, 131 N. Y. Supp. 995; *Deutsch v. Upton Cold Storage Co.*, 146 App. Div. 588, 131 N. Y. Supp. 273; *Mullin v. Curtis*, 145 App. Div. 441, 129 N. Y. Supp. 916; *Stude-*

baker Bros. Co. v. Western New York, etc., Co., 140 App. Div. 308, 125 N. Y. Supp. 224; Brody v. Weed & Co., 137 App. Div. 754, 122 N. Y. Supp. 625; Pinkus v. United Cloak & Suit Co., 124 App. Div. 535, 108 N. Y. Supp. 932; Harrison v. Holahan, 122 App. Div. 740, 107 N. Y. Supp. 741; Hurn v. Olmstead, 55 Misc. 504, 105 N. Y. Supp. 1091; Nichols v. Riley, 112 App. Div. 102, 98 N. Y. Supp. 346; Hays v. Faatz Reynolds Felting Co., 112 App. Div. 487, 98 N. Y. Supp. 386; Church v. Swigert, 99 App. Div. 273, 90 N. Y. Supp. 939; Groff v. Rome Metallic Bedstead Co., 98 App. Div. 152, 90 N. Y. Supp. 691. See also Jacobson v. German-American Button Co., 124 App. Div. 251, 108 N. Y. Supp. 795; Denzer v. Grewen, 133 App. Div. 706, 118 N. Y. Supp. 230; Aldine Mfg. Co. v. Duffy-McInnerney Co., 124 App. Div. 751, 109 N. Y. Supp. 596. The place where the transaction arose will not control where the convenience of witnesses will be contravened, the moving party having no witnesses. J. P. Lewis Co. v. Phoenix Car Co., 115 App. Div. 188, 100 N. Y. Supp. 669.

**1935 n. 41.** Woolworth v. Klock, 92 App. Div. 142, 86 N. Y. Supp. 1111.

**1935 n. 42.** And see Mole v. New York, O. & W. R. Co., 53 Misc. 22, 102 N. Y. Supp. 308.

**1935 n. 43.** Where impossible to figure out which party would have the larger number of witnesses, and plaintiff is physically and financially unable, change will be refused. Rowe v. Charles H. Ditson Co., 140 N. Y. Supp. 929.

**1936 n. 51.** Van Alstine v. Burt, 151 App. Div. 81, 135 N. Y. Supp. 779; Lewis v. Bethel, 156 App. Div. 894, 140 N. Y. Supp. 1041; Mole v. New York, O. & W. R. Co., 53 Misc. 22, 102 N. Y. Supp. 308. But while the rule is that the convenience of parties and of expert witnesses will not be consulted, yet there is a class of expert witnesses that form an exception to the rule, and such are those who may testify to the value of property from personal knowl-

edge, as distinguished from those who give their opinions on an assumed state of facts. *Groff v. Rome Metallic Bedstead Co.*, 98 App. Div. 152, 90 N. Y. Supp. 691. Their convenience will not be considered. *Solberg v. Fort Orange Const. Co.*, 142 N. Y. Supp. 228.

**1936 n. 52.** Otherwise where the witness is in the employ of plaintiff or his agent in the transaction and will necessarily be present. *Larkin v. Sheldon*, 59 Misc. 406, 109 N. Y. Supp. 1105.

**1936 n. 53.** *Mills v. Sparrow*, 131 App. Div. 241, 115 N. Y. Supp. 629; *Brady v. Cohen*, 57 Misc. 358, 109 N. Y. Supp. 628; *Quinn v. Brooklyn Heights R. Co.*, 88 App. Div. 57, 84 N. Y. Supp. 738; *Hirshkind v. Mayer*, 91 App. Div. 416, 86 N. Y. Supp. 836. Action should not be changed to county adjacent to New York county, in the absence of special circumstances. *Kavanaugh v. Mercantile Trust Co.*, 94 App. Div. 575, 88 N. Y. Supp. 113. May be granted in exceptional cases. *Hasbrouck v. Harris*, 157 App. Div. 931, 142 N. Y. Supp. 1122.

**1936 n. 54.** The venue has been changed to the city of New York from the county of Lewis, in which the action was brought, where defendant had seven material witnesses residing in such city, and plaintiff was the only material witness residing in the county of Lewis. *Larocque v. Conhaim*, 45 Misc. 234, 92 N. Y. Supp. 99.

**1937.** Stipulation insufficient to avoid change, see *Neeley v. Erie R. R. Co.*, 134 App. Div. 781, 119 N. Y. Supp. 953.

**1938 n. 60.** Each case is to be decided on its own facts. *People v. Hyde*, 149 App. Div. 131, 133 N. Y. Supp. 786. Fact the case has attracted widespread attention or that defendant is extensively acquainted as is his attorneys, and their business and political prominence, is insufficient. *Noonan v. Luther*, 128 App. Div. 673, 112 N. Y. Supp. 898. Order refusing change reversed in *Jacob v. Town of Oyster Bay*, 119 App. Div. 503, 104 N. Y. Supp. 275.

**1939** n. 68. But see *People v. Hyde*, 149 App. Div. 131, 133 N. Y. Supp. 306.

**1940** § 1494. Absence of demand does not deprive the court of power to thereafter change the place of trial. *Palmer v. Schwarzenback*, 136 N. Y. Supp. 85. If demand is on ground that the action is not one within § 982 of the Code, it does not furnish a basis for a motion on the ground of the residence of the parties. *Whitehead Bros. v. Dolan*, 69 Misc. 208, 126 N. Y. Supp. 414.

**1940** n. 71a. *Cronin v. Manhattan Transit Co.*, 124 App. Div. 543, 108 N. Y. Supp. 963.

**1941** n. 74. Contra, see *Hoffman v. Hoffman*, 153 App. Div. 191, 138 N. Y. Supp. 356.

**1942** n. 77. The fact that the demand is served at the same time that defendant interposes a demurrer, and that thereafter the demurrer is overruled with leave to answer over, is immaterial. *Washington v. Thomas*, 103 App. Div. 423, 92 N. Y. Supp. 994.

**1944** § 1500. The court cannot change the place of trial of its own motion. *Phillips v. Tietjen*, 108 App. Div. 9, 95 N. Y. Supp. 469; *Anderson v. Nassau Electric R. R. Co.*, 138 App. Div. 816, 123 N. Y. Supp. 374.

**1944** n. 90. Change of venue cannot be obtained by injunction. *Reis v. Graham*, 122 App. Div. 312, 106 N. Y. Supp. 645.

**1945** n. 93. *Bell v. Polymero*, 99 App. Div. 303, 90 N. Y. Supp. 920.

**1945** § 1503. Motion should not be granted, because of residence of parties, after affirmance of order granting a new trial, where no serious inconvenience of witnesses is shown. *Dembitz v. Orange County Traction Co.*, 147 App. Div. 583, 132 N. Y. Supp. 593.

**1946** n. 97. *State Board of Pharmacy v. Rhinehardt*, 116 App. Div. 495, 101 N. Y. Supp. 769.

**1946** n. 99. But notice need not be served upon a co-defendant who has not answered or appeared in the ac-

tion where the granting of the motion is a matter of right. *North Shore Industrial Co. v. Randall*, 108 App. Div. 232, 95 N. Y. Supp. 758.

**1947 n. 105.** After a trial resulting in a disagreement of the jury, a motion will not be granted, in the absence of exceptional reasons therefor. *Haines v. Reynolds*, 95 App. Div. 275, 88 N. Y. Supp. 589. Where both parties notice the case for trial and defendant appears at the term for which the case is noticed and obtains a postponement on account of the illness of a witness, he cannot thereafter move for a change for the convenience of witnesses. *Coleman v. Hayes*, 92 App. Div. 575, 87 N. Y. Supp. 12; *Schaaf v. Denniston*, 121 App. Div. 504, 106 N. Y. Supp. 168.

**1947 n. 111.** *Lindsley v. Sheldon*, 43 Misc. 116, 88 N. Y. Supp. 192.

**1947 § 1505.** Where plaintiff moves for a change to the county where defendant resides, defendant may oppose by moving to change to another county for convenience of witnesses. *Upjohn v. First M. E. Church Soc.*, 156 App. Div. 147, 140 N. Y. Supp. 1104.

**1948 § 1506.** Amendment cannot deprive court of power to hear pending motion to change place of trial. *Barbera v. Quittner*, 154 App. Div. 322, 138 N. Y. Supp. 1000.

**1949.** Where both parties act on the assumption that the county named in the summons is the place of trial, the mere fact that through inadvertence the county named in the complaint differs from that named in the summons does not change the place of trial. *Bell v. Polymero*, 99 App. Div. 303, 90 N. Y. Supp. 920.

**1950 n. 126.** Followed in *Ferrin v. Huxley*, 94 App. Div. 211, 87 N. Y. Supp. 1005.

**1951 § 1510.** The motion being as of right, no affidavit of merits is necessary. *Packard v. Hesterberg*, 48 Misc. 30, 96 N. Y. Supp. 72.

**1952.** The residence of the parties should be stated as of



the time of the commencement of the action. *Burke v. Frenkel*, 97 App. Div. 19, 89 N. Y. Supp. 621.

1952 n. 138. But see ante, 560 § 545.

1953 n. 142. *Lewis v. Bethel*, 156 App. Div. 894, 140 N. Y. Supp. 1041; *Noonan v. Luther*, 128 App. Div. 673, 112 N. Y. Supp. 898.

1954 § 1512. Formal affidavit of merits unnecessary, see *Agne v. Schwab*, 127 App. Div. 67, 111 N. Y. Supp. 8.

1955 n. 147. This provision was amended in 1910 so as to read as follows: "On motions to change the place of trial, the moving party shall state the nature of the controversy and show how his witnesses are material, and the grounds of his belief that the testimony of such witnesses will be favorable to his contention, and shall also show where the cause of action arose, and such facts shall be taken into consideration by the court in fixing the place of trial." By the amendment, the provision is confined to the moving party and made mandatory.

1955 n. 153. Omission of this statement is a fatal defect. *Ottley v. Jackson Memorial, etc., Church*, 157 App. Div. 222, 141 N. Y. Supp. 816.

1957 n. 158. See also *Mole v. New York, O. & W. R. Co.*, 53 Misc. 22, 102 N. Y. Supp. 308. Contra. Need not disclose ground of expectation that witnesses will testify to material facts claimed. *Kalbfleisch v. Rider*, 120 App. Div. 623, 105 N. Y. Supp. 539.

1957 n. 160. See *Hurn v. Olmstead*, 55 Misc. 504, 105 N. Y. Supp. 1091.

1959 § 1513. If plaintiff makes an opposing affidavit as to his actual residence, it overcomes defendant's affidavit in regard thereto on information and belief. *Hoffman v. Hoffman*, 153 App. Div. 191, 138 N. Y. Supp. 356.

1960 n. 166. *Lageza v. Chelsea Fibre Mills*, 135 App. Div. 731, 119 N. Y. Supp. 906; *Mills & Gibb v. Starin*, 119 App. Div. 336, 104 N. Y. Supp. 230.

**1960** nn. 166, 167. Under late amendments of the Code relating to motions and orders (ante, **588** n. 138), it would seem that these rules are not now the law.

**1960** n. 169. See *Jacina v. Lemmi*, 155 App. Div. 397, 139 N. Y. Supp. 1034. Where the opposing affidavits do not state the advice of counsel that the testimony of the witnesses for the opposing party is material and necessary, nor that they will swear to any material fact, nor give the names and addresses and occupations of such witnesses other than by referring to certain partnerships, the motion should be granted. *Rieger v. Pulaski Glove Co.*, 114 App. Div. 174, 99 N. Y. Supp. 558.

**1962** n. 175. *J. P. Lewis Co. v. Phoenix Car Co.*, 115 App. Div. 188, 100 N. Y. Supp. 669.

**1963** § 1518. Remedy where order entered by consent is claimed to have been induced by false representations is to move to vacate it. *Loper v. Wading River Realty Co.*, 143 App. Div. 167, 127 N. Y. Supp. 1000.

## CHAPTER XII

### REMOVAL OF CAUSE TO ANOTHER COURT

No New Matter Has Been Found for This Chapter

## CHAPTER XIII

### PROCURING DOCUMENTARY EVIDENCE

**1966** n. 1. Failure to produce does not prove case of party giving notice. *Bissell v. Myton*, 160 App. Div. 268.

**1968**. After a determination that plaintiff is not entitled to an inspection of defendant's books, and a subpoena duces tecum against defendant to produce his books so that he can, by reference to them, answer questions pertinent to the in-

quiry, defendant cannot be compelled to answer a question which requires him to give entries in the book. *Franklin v. Judson*, 99 Div. 323, 91 N. Y. Supp. 100.

**1968** n. 9. *Matter of Foster*, 139 App. Div. 769, 124 N. Y. Supp. 667. Such a subpoena, issued in supplementary proceedings to a third person, is a nullity, unless issued by the judge. *Gaynor v. New York Breweries Co.*, 154 App. Div. 881, 138 N. Y. Supp. 899.

**1968** § 1527. Written evidence in hands of third person can be reached only by such a subpoena. *Murdock v. McCutchen*, 154 App. Div. 854, 140 N. Y. Supp. 41.

**1968** n. 12. Where written evidence is in the hands of persons not parties to the action, the only way to get possession of it is by subpoena duces tecum. *Murdock v. McCutchen*, 154 App. Div. 854, 140 N. Y. Supp. 41.

**1968** n. 14. No necessity for subpoena where papers are actually present in court. *Searle v. Halstead & Co.*, 139 App. Div. 134, 123 N. Y. Supp. 984.

**1969** § 1528. Power to issue does not violate search and seizure clause of Constitution. *Matter of Mohawk Overall Co.*, 210 N. Y. 474, 104 N. E. 925 [aff. 156 App. Div. 879]. Books and papers sought to be produced before commissioners of account must have some materiality or relevancy to a matter lawfully under consideration. *Matter of Foster*, 139 App. Div. 769, 124 N. Y. Supp. 667.

**1969** n. 17. *Matter of Albany Investigation*, 74 Misc. 172, 132 N. Y. Supp. 908.

**1971** § 1530. Failure to produce authorizes secondary evidence. *Guggenheim v. Reinhardt*, 123 N. Y. Supp. 950.

**1971** n. 26. That additional penalty may be imposed, see *Edison Electric Light Co. v. Tipless Lamp Co.*, 72 Misc. 116, 130 N. Y. Supp. 1089.

**1972** n. 32. *Matter of Barnes*, 204 N. Y. 120, 97 N. E. 508. Waiver of objections to jurisdiction of legislature

committee, see *Matter of Albany Investigation*, 74 Misc. 170, 132 N. Y. Supp. 908.

**1973 n. 35.** Rule 9 of the General Rules of Practice, added in 1913 in the place of the old rule relating to entry of appearance which was repealed in 1910, relates to subpoena duces tecum. It provides as follows: "No subpoenas duces tecum requiring a library association or corporation; a public officer; a department of a municipal corporation or other public officer or department, to produce on the trial of an action or special proceeding before a court or referee, books, papers or other documents or writings in its or his possession, shall be issued except by a justice of the Supreme Court in the District in which the library or department is located or the public officer is employed, or a judge of the court in which the action or special proceeding is pending, and except upon one day's notice to the library, officer, corporation or head of the department having possession of the books, papers or other documents or writings and also to the opposing party or his attorney. The justice or the judge to whom the application is made shall not require the production of such books, papers or other documents or writings before a court or referee, when a stipulation between the attorneys or a copy thereof, duly verified, will in his opinion serve the purpose of such production, and he may impose such other conditions as may in his opinion be reasonable. Upon the refusal of a party to such an application to make such stipulation when required so to do, the justice or the judge (to whom the application for a subpoena duces tecum is made) may impose upon such party the actual cost or expense incurred in producing the books, papers or other documents or writings in accordance with the subpoena, in addition to the fees now required by law upon the service of a subpoena."

**1973 § 1533.** Motion to set aside the subpoena is proper. *Matter of Foster*, 139 App. Div. 769, 124 N. Y. Supp. 667.

1974 n. 40. Cited in *People v. Mills*, 178 N. Y. 283, 287, 308 (criminal case).

## CHAPTER XIV

### OBTAINING ADMISSION OF GENUINENESS OF PAPER

No New Matter Has Been Found for This Chapter

## CHAPTER XV

### COMPELLING ATTENDANCE OF WITNESS

1978 n. 7. Fee may be waived. *Downey v. Fenn*, 124 N. Y. Supp. 876. Mileage sufficient where from place where served, although not place of residence, to place of trial. *Downey v. Fenn*, 124 N. Y. Supp. 876.

1979 n. 13. *Westervelt v. Shapiro*, 132 N. Y. Supp. 338. No contempt if witness not tendered mileage prescribed by law. *Ahrens v. Coleman*, 66 Misc. 569, 121 N. Y. Supp. 1121. May be fined for contempt although party subpoenaing him is successful or he has acted under advice of counsel. *People ex rel. Springs v. Reid*, 139 App. Div. 551, 124 N. Y. Supp. 205.

1979 n. 14. Attachment may be executed by sheriff outside county; and irregularity or mistake in copy of affidavit served, where not prejudicial, is not fatal. But the warrant must be dismissed where made returnable before the justice of the Supreme Court who issued it instead of a term of court at which contested motion may be heard. *Downey v. Fenn*, 124 N. Y. Supp. 826.

1980 n. 22. But see ante, 1979 n. 13.

1983 § 1542. *Matter of Albany Investigation*, 74 Misc. 172, 132 N. Y. Supp. 908.

1983 n. 45. This provision is mandatory and applies to a

subpoena issued in supplementary proceedings, so that if issued and signed by the attorney it is insufficient. *Lowther v. Lowther*, 115 App. Div. 307, 100 N. Y. Supp. 965.

1984 n. 48. Matter of Phillips, 70 Misc. 8, 127 N. Y. Supp. 1048. Code provision is constitutional. Matter of Union Bank, 73 Misc. 404, 132 N. Y. Supp. 905.

1984 n. 49. Rule applied to legislative investigation. Matter of Albany Investigation, 74 Misc. 172, 132 N. Y. Supp. 908. Provision is constitutional. Matter of Barnes, 204 N. Y. 108, 97 N. E. 508. What questions are "legal and pertinent" in investigation of municipal affairs by legislative committee, see Matter of Barnes, 204 N. Y. 108, 97 N. E. 508.

1984 n. 51. But see Matter of Barnes, 204 N. Y. 108, 97 N. E. 508.

1986 n. 59. This provision was amended in 1914 (c. 133) by the following proviso as to persons confined for a felony: "except by and in the discretion of a justice of the supreme court upon such notice to the district attorney of the county wherein the prisoner was convicted, and upon such terms and conditions, and under such regulations, as the judge prescribes."

## CHAPTER XVI

### OFFER TO ALLOW JUDGMENT

1989 n. 1. Statute does not apply to actions to foreclose a mechanic's lien. *Ball v. Doherty*, 144 App. Div. 278, 128 N. Y. Supp. 1014.

1991 n. 11. See *Fulton County Gas & E. Co. v. Hudson River Tel. Co.*, 200 N. Y. 287, 292.

1991 § 1548. Sufficiency of offer of judgment, to avoid costs, in action to foreclose mechanic's lien, see *Salerno v. Vogt*, 78 Misc. 64, 138 N. Y. Supp. 664.

1996. The offer and acceptance constitute a contract and

are to be construed according to the condition of the pleadings at the time the offer was made. Construction of offer in a suit for specific performance, see *Abel v. Bischoff*, 99 App. Div. 248, 90 N. Y. Supp. 990.

**1999 n. 81.** In *McNally v. Rowan*, 101 App. Div. 342, 92 N. Y. Supp. 250, the court states that the case cited in this note is not the law since the amendment of the mechanic's lien law in 1885 by permitting a personal judgment where the lien is not established. It follows that where the offer of judgment is merely for a sum of money, a judgment, though for a less sum, where a lien directed to be enforced by a sale of the premises and a deficiency judgment, if necessary, is more favorable to plaintiff.

**2000 nn. 85, 87.** Where a plaintiff recovered a judgment for a few cents less than the offer made before answering, but the judgment extinguished a counterclaim for twenty-five dollars which would not have been extinguished had the offer of judgment been accepted, the judgment recovered is more favorable than the offer. *Smith v. Sheldon*, 94 App. Div. 497, 87 N. Y. Supp. 1099.

## CHAPTER XVII

### OFFER TO LIQUIDATE DAMAGES

No New Matter Has Been Found for This Chapter

## CHAPTER XVIII

### TENDER

**2005 n. 1.** See *Goldman v. Swartwout*, 117 App. Div. 185, 102 N. Y. Supp. 302.

**2005 § 1553.** Sections 731-734 of the Code do not apply to a summary proceeding. *People ex rel. Terwilliger v. Chamberlain*, 140 App. Div. 503, 125 N. Y. Supp. 562.

**2006** n. 5. Applies to actions for recovery of money only. *Browning, King & Co. v. Chamberlain*, 210 N. Y. 270.

**2006** § 1555. Tender after action commenced, see *Weyand v. Park Terrace Co.*, 135 App. Div. 821, 120 N. Y. Supp. 192.

**2008** n. 22. *Eickhoff v. Gillies*, 121 N. Y. Supp. 334.

**2008** n. 23. *Reusens v. Arkenburgh*, 135 App. Div. 75, 119 N. Y. Supp. 821; *Rumpf v. Schiff*, 109 N. Y. Supp. 51.

**2008** n. 26. Same rule applies to tender by plaintiff. *Weil v. Lippman*, 55 Misc. 443, 105 N. Y. Supp. 516. Payment regarded as made to make good plea of tender before suit brought. *Bieber v. Goldberg*, 120 App. Div. 457, 104 N. Y. Supp. 1080 [citing *Nichols' N. Y. Pr.*, p. 2008]. But where a composition agreement is set up as a defense to an action on the original obligation, and tender thereunder is shown, the refused tender need not be kept good. *Rosenzweig v. Kalichman*, 56 Misc. 345, 106 N. Y. Supp. 860.

**2009** n. 30. *Stratton v. Graham*, 140 N. Y. Supp. 869.

**2010** n. 39. *Germania Life Ins. Co. v. Potter*, 124 App. Div. 814, 109 N. Y. Supp. 435. Not good if objected to. *Rumpf v. Schiff*, 109 N. Y. Supp. 51.

**2010** n. 40. *Campbell v. Abbott*, 60 Misc. 93, 111 N. Y. Supp. 782.

**2013**. The court has no power to make an order in the same action which in effect retransfers the title. *Mann v. Sprout*, 185 N. Y. 109, 77 N. E. 1018 [reversing 102 App. Div. 60, 92 N. Y. Supp. 372].

**2013** n. 62. *Heller v. Katz*, 62 Misc. 266, 114 N. Y. Supp. 806.

**2013** n. 67. *Heller v. Katz*, 62 Misc. 266, 114 N. Y. Supp. 806.

**2013** n. 68. *Heller v. Katz*, 62 Misc. 266, 114 N. Y. Supp. 806; *Bieber v. Goldberg*, 120 App. Div. 457, 104 N. Y. Supp. 1080.

**2013** n. 70. *Friedman v. Erste Kaiser, etc., Verein*, 104 N. Y. Supp. 908.



## CHAPTER XIX

## PAYMENT OF MONEY INTO COURT

**2014** § 1561. See also *Erie County v. Diehl*, 129 App. Div. 735, 114 N. Y. Supp. 80.

**2016** n. 9. This rule of practice was repealed in 1910.

**2016** § 1564. Order requiring deposit of specified sum "with interest" construed as meaning interest at the legal rate of six per cent. *Lawrence v. Grout*, 121 App. Div. 701, 106 N. Y. Supp. 500. Laws 1908, c. 182, amends the Code by inserting a new section to be § 744a, and which reads as follows: "The comptroller may examine the books, accounts and vouchers of every bank and trust company in the state, in anywise relating to moneys and securities paid into court, under an order of any court of record; and where the same has not been paid to the chamberlain of the city of New York or to any county treasurer of the state, the comptroller upon an application duly made shall be entitled to an order directing the payment and transfer of all such money and securities, from any of such banks and trust companies, to the treasurer of the proper county, and in the city of New York to the city chamberlain." Section 744 of the Code is amended by Laws 1908, c. 181, by adding the clause after the provision that the comptroller of the state shall supervise the administration of all funds paid into any court of record, "or ordered to be so paid by a judgment, order or decree of any such court of record," and by adding the sentence "He shall have power and authority to institute proceedings to enforce obedience to the judgments, orders or decrees of the said courts for the deposit of moneys and securities into court." Section 744 of the Code is now Cons. Laws, c. 11, § 240, and c. 56, § 4. The 1908 amendment (Code, § 744a) is valid. *Matter of Sohmer*, 153 App. Div. 752, 138 N. Y. Supp. 795. Moneys on deposit with a savings

bank in name of guardian ad litem, where bank not a designated depository of court funds, are not moneys paid into court within § 744a of the Code. *Matter of Harris*, 77 Misc. 590, 137 N. Y. Supp. 234. What constitutes payment into court under § 744a of the Code, see *Matter of Sohmer*, 153 App. Div. 752, 138 N. Y. Supp. 795. Under § 744a of the Code, application for transfer need not be made on notice to the parties interested in the fund. *Matter of Walsh*, 204 N. Y. 276, 97 N. E. 715; *Matter of Sohmer*, 156 App. Div. 781, 141 N. Y. Supp. 740. In a proceeding under § 744a of the Code, accounting need not be had. *Matter of Walsh*, 204 N. Y. 276, 97 N. E. 715. Scope of order under § 744a of the Code, see *Matter of Walsh*, 204 N. Y. 276, 97 N. E. 715.

**2017 n. 13.** This rule of court was repealed in 1910.

**2017 n. 14.** This rule of court was repealed in 1910.

**2018 n. 15.** Laws 1908, c. 183, amends § 745 of the Code by striking out the first sentence thereof and providing instead that "All moneys and securities paid, transferred, or deposited into court, must be paid or transferred, either directly or by the officer who is required by law first to receive it, to the county treasurer of the county, where the action is triable, or to such other county treasurer as the court specially directs." The second sentence is amended to include a security delivered to an officer and the provision for payment or transfer over is changed from four to two days. The last sentence of such Code provision is stricken out by the amendment.

**2018 n. 16.** The last sentence is omitted by the amendment of this Code provision by Laws 1909, c. 65, and part of the section is now Cons. Laws, c. 2, § 44.

**2019 n. 19.** Laws 1908, c. 183, amends § 747 of the Code by striking out the words "or deposited" after the clause "may be paid out, transferred, invested or reinvested."

**2019 n. 22.** Rule amplified by section 752 of the Code as amended by Laws 1909, c. 65. Rule amended in 1910.

**2019 § 1566.** Superintendent of banks, upon taking possession of trust company, does not become entitled to moneys held by it under a court order as a payment into court; and an order requiring payment over to the city chamberlain is proper. *Van Wagoner v. Buckley*, 148 App. Div. 808, 133 N. Y. Supp. 599. A motion to require a custodian to pay over funds held under order of court is properly made in the county in which the action wherein the money was deposited was brought, and need not be made in the county where the custodian had its principal place of business. *Van Wagoner v. Buckley*, 148 App. Div. 808, 133 N. Y. Supp. 599.

**2021.** Return of securities required by court to be deposited with trust company, see *Ketchum v. Prevost*, 157 App. Div. 781, 142 N. Y. Supp. 711.

**2021 n. 33.** As amended in 1910, this rule authorizes an order for payment only to the party entitled to receive the payment and not to his attorney of record. *Avis v. Straus*, 157 App. Div. 904, 142 N. Y. Supp. 283.

**2021 n. 35.** Notice must be given to all who appear by the record to have an interest. *Matter of Barry*, 138 App. Div. 899, 123 N. Y. Supp. 376. By amendment of this rule in 1910 the following was added: "All orders directing the payment of money out of court shall direct the payment to be made to the person entitled to receive the same, and all checks or drafts for the payment of money out of court shall be drawn payable to the order of the person entitled to the moneys; and shall specify in what particular suit or on what account the money is to be paid out, and the time when the order authorizing such payment was made."

**2022.** Losses from bad investments are entitled to be paid out of general fund of Supreme Court. *Matter of Stevenson*, 137 App. Div. 789, 122 N. Y. Supp. 664.

**2022 n. 37.** The check or draft must be drawn in precise accordance with the order of court, or the trust company may refuse to pay it. So held where representative character

of payees was not as fully described in check as in order of court. *Holt v. Colonial Trust Co.*, 97 App. Div. 305, 89 N. Y. Supp. 955.

**2023** n. 43. Rule applied to city chamberlain. *Matter of McNulty*, 68 Misc. 93, 123 N. Y. Supp. 1070.

## CHAPTER XX

### POSTPONEMENT OF TRIAL

**2024** § 1570. Engagement of counsel in trying a case in another court authorizes an adjournment without terms as of course. *Goldstein v. Frumkes*, 74 Misc. 450, 132 N. Y. Supp. 318. Presence of attorney in another court waiting for trial to commence is ground. *Cebrelli v. Bradley*, 65 Misc. 59, 119 N. Y. Supp. 255. Actual engagement of counsel as ground, see also *Anthony v. United Machine, etc., Co.*, 120 N. Y. Supp. 823. Postponement pending appeal in another case is not proper where decision therein would not obviate necessity of trial. *Reed v. Fenn*, 120 N. Y. Supp. 972. Setting a case down for trial "peremptorily" cannot deprive a party from having a postponement thereof, if he has a legal excuse, although it may require stronger proof to obtain a postponement under such circumstances than it otherwise would. *Harde v. Purdy*, 115 N. Y. Supp. 92.

**2024** n. 2. Where an offer of foreign records to prove a material fact in issue was rejected because of the failure to prove the foreign law under which such records were kept, the court should not refuse an application to withdraw a juror on the ground of surprise. *Pirrung v. Supreme Council of Catholic Mut. Ben. Ass'n*, 104 App. Div. 571, 93 N. Y. Supp. 575.

**2025** n. 7. Where defendant in a personal injury case was entitled to presume that a second trial of the action

would be on the same theory as the first, and plaintiff was allowed to amend his complaint on the second trial by stating a different ground of negligence, the court should permit a continuance to enable defendant to procure new witnesses. *McDonald v. Holbrook, C. & D. Contracting Co.*, 105 App. Div. 90, 93 N. Y. Supp. 920.

**2026 n. 17.** Where witness has been subpoenaed and in attendance, but has left the court room, an adjournment should be granted to issue an attachment for the witness. *Pearl v. Metropolitan Life Ins. Co.*, 141 N. Y. Supp. 532. That officer of defendant corporation, the sole witness, is serving as a juror is no excuse since he might have been excused from jury service. *Warth v. Moore Blind Stitcher & Overseamer Co.*, 125 App. Div. 211, 109 N. Y. Supp. 116.

**2026 n. 18.** *Hosman v. Kinneally*, 43 Misc. 76, 86 N. Y. Supp. 263.

**2026 n. 19.** See, also, *Faist v. Metropolitan St. R. Co.*, 89 App. Div. 593, 85 N. Y. Supp. 646.

**2026 nn. 18, 30.** In the absence of proof of surprise, the denial of an application to adjourn for the purpose of calling another witness, made near the close of defendant's testimony, is not abuse of discretion. *Block v. Sherry*, 43 Misc. 342, 87 N. Y. Supp. 160.

**2027 § 1571.** "Excepting in extreme cases, it is better that the practice heretofore existing be adhered to, and that inquest be allowed to be taken where the court denies the motion to postpone, leaving the party making default to his remedy by motion at Special Term, where the whole matter may be disposed of by one motion, and there is greater authority and discretion in imposing terms. It is not for the party making the motion to postpone to dictate to the court the precise day and hour when his motion shall be heard and decided. His right to have an order entered does not accrue until the court has finally considered and denied his motion and decided to proceed with the trial or allow a

dismissal or an inquest by default. If a motion be made before the cause is in a position to be moved for trial, the court may hold the motion and reserve decision until the cause is reached for trial, unless the rules of the court provide otherwise. An absent witness, for instance, if that should be the ground for postponement, might return before the cause would be reached for trial. When, however, the decision of the court on the motion becomes final, and the court, without intending to further consider the application, denies the motion without reserve, under circumstances indicating that it is reasonably probable that the cause will be tried or an inquest will be taken therein, then the party should have the benefit of the entry of an order from which he may appeal." *In re Rubenstein*, 129 App. Div. 326, 113 N. Y. Supp. 554.

**2027 n. 22.** *Waith v. Moore Blind Stitcher & Overseamer Co.*, 125 App. Div. 211, 109 N. Y. Supp. 116.

**2027 n. 31.** Should not be denied because opposed by plaintiff's attorney who is unable to show authority to commence the action. *Kelly v. New York City R. Co.*, 122 App. Div. 467, 106 N. Y. Supp. 894. See also *Herman v. New York City R. Co.*, 122 App. Div. 469, 106 N. Y. Supp. 896.

**2028.** Motion based on absence of witness should be made promptly. *Warth v. Moore Blind Stitcher & Overseamer Co.*, 125 App. Div. 211, 109 N. Y. Supp. 116.

**2028 n. 33.** Sufficiency of affidavit where ground is engagement of counsel in another case, see *Nahe v. Bauer*, 133 App. Div. 373, 117 N. Y. Supp. 355.

**2028 n. 34.** See *In re Rubenstein*, 129 App. Div. 326, 113 N. Y. Supp. 554.

**2028 n. 37.** Statement of conclusion that witness is material and necessary is insufficient. *Warth v. Moore Blind Stitcher & Overseamer Co.*, 125 App. Div. 211, 109 N. Y. Supp. 116.

**2031 n. 55.** Where a party considers that the terms im-  
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posed as a condition of granting his request for a postponement are onerous and unsatisfactory, he should decline to accept the order on the terms imposed, and proceed with the trial. *Rawson v. Silo*, 105 App. Div. 278, 93 N. Y. Supp. 416. After the trial of an action has commenced, and one of the parties asks to be allowed to withdraw a juror and have the trial postponed for the term, it is not an abuse of discretion for the court to require, as a condition of granting the request, that the party making the request pay to his opponent a term fee, a trial fee, and the witnesses' fees of the term. *Id.*

**2033** n. 69. See also *Mosseim v. Empire State Surety Co.*, 117 App. Div. 820, 102 N. Y. Supp. 1013. But see *Herbert Land Co. v. Lorenzen*, 113 App. Div. 802, 99 N. Y. Supp. 937. *Contra*, *Damsky v. Dochterman*, 61 Misc. 597, 114 N. Y. Supp. 170 (holding that order affects a substantial right and appeal lies to Appellate Term); *Warth v. Moore Blind Stitcher & Overseamer Co.*, 125 App. Div. 211, 109 N. Y. Supp. 116. On the denial of an application for the postponement of the trial of an action the better practice for an aggrieved party is either to proceed with the trial and appeal from a judgment, if one is obtained against him, and bring up for review the order denying his motion for a postponement, or to suffer a default and then to move to open such default. *Harde v. Purdy*, 62 Misc. 232, 114 N. Y. Supp. 814, refusing, however, under the particular circumstances, to dismiss the appeal from the order.

## CHAPTER XXI

APPOINTMENT OF GUARDIAN AD LITEM FOR DEFENDANT AND  
GENERAL RULES AS TO GUARDIANS AD LITEM

**2037** n. 3. Committee may be appointed guardian ad litem. *Hill v. Guaranty Trust Co.*, 157 App. Div. 907, 142 N. Y. Supp. 346.

**2038** § 1576. Cannot be appointed for infant, on death of parent pending suit, where infant has not been made a party. *Gruner v. Ruffner*, 134 App. Div. 837, 119 N. Y. Supp. 942.

**2039**. Service of the "order" mentioned in section 473 of the Code or of the summons under section 471 are not necessary where some one other than the plaintiff applies. *Gruner v. Ruffner*, 59 Misc. 266, 110 N. Y. Supp. 873.

**2039** n. 9. Notice of the application must be given to the general or testamentary guardian. *Van Williams v. Elias*, 106 App. Div. 288, 94 N. Y. Supp. 611.

**2039** n. 11. No prior service of the summons and complaint is necessary. *Taylor v. Emmett*, 137 App. Div. 202, 122 N. Y. Supp. 66 [rev. 66 Misc. 74, 122 N. Y. Supp. 757].

**2039** n. 12. Where the infants were without the state and had no general guardian, and the petition for appointment of a guardian ad litem was made by a friend pursuant to a request from their father, no notice to anybody was necessary. *Gruner v. Ruffner*, 59 Misc. 266, 110 N. Y. Supp. 873.

**2039** n. 14. *Van Williams v. Elias*, 106 App. Div. 288, 94 N. Y. Supp. 611.

**2041** n. 26. *Smith v. Blood*, 106 App. Div. 317, 94 N. Y. Supp. 667. An order entered in such an action need not be obeyed by the infant. *Gross v. Gross*, 128 App. Div. 429; 112 N. Y. Supp. 790.

**2046** n. 59. See post, **2838** n. 517.



**2046 n. 64.** Amount of undertaking fixed by amendment to Rule 51 of the General Rules of Practice as "double the amount of such money or property," and executed by a surety company authorized to do business in this state, "or a bond secured by a mortgage on improved and unincumbered real property."

**2047.** If security not given, payment to a guardian ad litem or his attorney is a nullity so far as the infant is concerned; and in such a case the guardian or his attorney cannot issue execution. *Heiter v. Joline*, 135 App. Div. 13, 119 N. Y. Supp. 819.

**2047 n. 70.** *Heiter v. Joline*, 135 App. Div. 13, 119 N. Y. Supp. 819.

**2048 § 1581.** Where order is silent as to bond, authority for executing and filing cannot be given nunc pro tunc. *Lippert v. Gates*, 74 Misc. 36, 133 N. Y. Supp. 733.

**2048 n. 71.** Address to be placed on notices should be specifically set forth; but jurisdiction is acquired although order is not specific if notices were actually received. *Taylor v. Emmett*, 137 App. Div. 202, 122 N. Y. Supp. 66 [rev. 66 Misc. 74, 122 N. Y. Supp. 757].

**2049 n. 73.** *Lippert v. Gates*, 74 Misc. 36, 133 N. Y. Supp. 733.

**2049 n. 75.** See also ante, **2039**.

**2049 § 1583.** Limited to \$500 in particular case. *Walbridge v. Walbridge*, 139 App. Div. 223, 123 N. Y. Supp. 580. "The law seems to be settled in this state by a long line of decisions that the court has no power to award a guardian ad litem compensation, payable out of the estate, beyond the taxable costs, including additional allowances authorized by the statute; that any additional compensation must be made payable out of the interest of the infant; and that, where it turns out that the infant has no interest in the subject-matter of the litigation, the guardian has to be content with the statutory costs and allowances." *Walbridge*

v. Walbridge, 132 App. Div. 33, 116 N. Y. Supp. 239. See also post, 3001 nn. 745, 746.

2051 n. 87. Cannot settle or compromise claim without order of court. Heiter v. Joline, 135 App. Div. 13, 119 N. Y. Supp. 819.

## CHAPTER XXII

### NOTICE OF PENDENCY OF ACTION

No New Matter Has Been Found for This Chapter

## CHAPTER XXIII

### MOTION FOR A STRUCK JURY

2054. Special jury in place of struck jury held proper in *People v. McClellan*, 124 App. Div. 664, 109 N. Y. Supp. 76, where motion for a struck jury or other proper relief.

2054 n. 3. Held proper in libel action. *Jerome v. New York Evening Journal Pub. Co.*, 124 App. Div. 372, 108 N. Y. Supp. 801.

2056 § 1592. In New York county, under the statutes of 1901 and 1904, providing for a special jury in place of a struck jury, it is not necessary to follow the Code practice but a special jury may be drawn in accordance with such statutes. *Jerome v. New York Evening Journal Pub. Co.*, 124 App. Div. 372, 108 N. Y. Supp. 801.

2057. The proceeding relating to the selection of a special jury, as fixed by sections 1063-1069 of the Code of Civil Procedure, must be strictly followed, and cannot be disregarded in any respect. *Industrial & General Trust v. Tod*, 104 App. Div. 517, 34 Civ. Proc. R. 287, 93 N. Y. Supp. 725. A list of jurors selected in the absence of the parties or their counsel, the statute directing that it should be done in their

presence, is irregular, and ought to be set aside. The purpose sought to be accomplished by requiring that the names be selected in the presence of the parties or their counsel tends to insure the selection of a jury contemplated by the statute, viz., "most indifferent between the parties and best qualified to try the issue." *Id.* "It would seem, in view of the fact that the statute requires the selection of the names of persons best qualified to try the issue, that the commissioner, before making the selection, should familiarize himself with it; otherwise it is difficult to see how he can act intelligently or do what the statute requires." *Id.*

2058 n. 24. Where the court, at Special Term, has, in the first instance, directed that the jury be struck, and it afterwards appears that any irregularity occurred in the selection of the jury which would render the proceeding a nullity or jeopardize the result sought to be obtained by such jury, the Special Term has the power and it is its duty to direct that the jury as selected be set aside and discharged, and a new jury be struck. *Industrial & General Trust v. Tod*, 104 App. Div. 517, 34 Civ. Proc. R. 287, 93 N. Y. Supp. 725.

## CHAPTER XXIV

### MOTION FOR A FOREIGN JURY

No New Matter Has Been Found for This Chapter

## PART VII

### TERMINATION OF ACTION WITHOUT TRIAL

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#### CHAPTER I

##### ABATEMENT AND REVIVAL

**2063** § 1599. An action by a director against co-directors for mismanagement, etc., is abated by his ceasing to be a director. *Hamilton v. Gibson*, 145 App. Div. 825, 130 N. Y. Supp. 684.

**2063** n. 6. Contra. *Sinnott v. Hanan*, 156 App. Div. 323, 141 N. Y. Supp. 505.

**2063** n. 7. *People ex rel. Chicotte v. Best*, 187 N. Y. 1, 79 N. E. 890; *People ex rel. Lazarus v. Coleman*, 99 App. Div. 88, 91 N. Y. Supp. 432.

**2064** § 1600. Sections 1909 and 1910 of the Code are now Cons. Laws, c. 41, § 41. Where the death of defendant abates a cause of action in the absence of a statute to the contrary, the statute which governs is the one in force at the time of the death rather than at the time the cause of action accrued. *Gorlitzer v. Wolffberg*, 208 N. Y. 475, 102 N. E. 528.

**2065** n. 19. *Mayer v. Ertheiler*, 144 App. Div. 158, 128 N. Y. Supp. 807.

**2066** § 1601. Action for unauthorized use of one's name and picture does not survive the death of plaintiff. *Wyatt v. Hall's Portrait Studio*, 71 Misc. 199, 128 N. Y. Supp. 247. Penal actions, in the absence of express statutory provisions,

do not survive the death of either party. *People v. Newcomb*, 75 Misc. 258, 135 N. Y. Supp. 151. Action for loss of services of wife from personal injuries abates on death of defendant. *Gorlitzer v. Wolffberg*, 208 N. Y. 475, 102 N. E. 528. If an action is brought by a servant against his master for personal injuries, based on the common law, and plaintiff thereafter dies, her administratrix cannot be substituted as plaintiff pursuant to the Federal Employers' Liability Act under which the cause of action survives, where the time to sue thereunder has expired. *Hughes v. New York, Ontario & W. R. Co.*, 158 App. Div. 443, 143 N. Y. Supp. 603.

**2066** n. 24. Assault and battery and unlawful entry and detainer. *Mulligan v. O'Brien*, 53 Misc. 4, 102 N. Y. Supp. 911.

**2067** n. 38. *Hunt v. Hunt*, 75 Misc. 209, 135 N. Y. Supp. 39. An action of divorce is of a personal nature which in the absence of statutory provision abates with the death of the party bringing it. *Matter of Crandall*, 196 N. Y. 127, 89 N. E. 728.

**2068** § 1602. An action to establish the validity of a will does not abate on the death of plaintiff. *Carolan v. O'Donnell*, 141 App. Div. 463, 126 N. Y. Supp. 551. An action for fraud and deceit in inducing a sale survives the death of defendant. *Mayer v. Ertheiler*, 144 App. Div. 158, 128 N. Y. Supp. 807. Death of plaintiff does not abate action against railroad company for failure to carry safely. *Daniel v. Brooklyn Heights R. Co.*, 76 Misc. 482, 135 N. Y. Supp. 698. An action to recover damages for the refusal to allow a veteran preference survives the death of plaintiff. *Burke v. Holtzmann*, 117 App. Div. 292, 102 N. Y. Supp. 162.

**2068** n. 48. But under the statute as changed by the Decedent Estate Law (Cons. Laws, c. 13, § 120), an action by a husband for loss of services of his wife resulting from personal injuries abates on the death of defendant. *Gorlitzer v. Wolffberg*, 208 N. Y. 475, 102 N. E. 528.

**2069** n. 52. *Mulligan v. O'Brien*, 53 Misc. 4, 102 N. Y. Supp. 911.

**2070** n. 59. *Conway v. City of New York*, 139 App. Div. 446, 124 N. Y. Supp. 660.

**2071** n. 68. See also *Keeler v. Dunham*, 114 App. Div. 94, 99 N. Y. Supp. 669.

**2072** n. 77. The special proceeding is suspended by the death of a sole party so that the referee has no power to make or file a report against such party until a substitution of the personal representative or the successor in interest of the deceased. In *re Venable*, 93 N. Y. Supp. 1074.

**2073** n. 80. It seems that a new plaintiff cannot be joined or substituted, upon defendant's motion, where both the former and the old plaintiff oppose the motion. *Rothbarth v. Herzfeld*, 159 App. Div. 733, 144 N. Y. Supp. 974. A motion by plaintiff to substitute a trustee in bankruptcy as plaintiff is properly denied where not made until after judgment against plaintiff, to relieve him of liability for costs. *Murtagh v. Sullivan*, 74 Misc. 517, 132 N. Y. Supp. 503. Substitution as respondents on appeal not necessary. *Fox v. Peacock*, 153 App. Div. 887, 138 N. Y. Supp. 535. This Code provision does not authorize the prosecution of an action by one who has assigned all his interest pending the action and thereafter amended the complaint so as to seek new relief. *Foster v. Central Nat. Bank*, 183 N. Y. 379, 76 N. E. 338.

**2073** n. 81. *Hawkins v. Mapes-Reeve Const. Co.*, 178 N. Y. 236, 242; *Farmers' Loan & Trust Co. v. Pendleton*, 115 App. Div. 506, 101 N. Y. Supp. 340.

**2074**. Substitution of supervisors in taxpayer's action, where term of office has expired, see *Shiebler v. Ireland*, 141 N. Y. Supp. 762.

**2075** n. 92. See ante, **2063** n. 6.

**2075** n. 96. *Burrow v. Otto Sarony Co.*, 132 App. Div. 797, 117 N. Y. Supp. 537.

**2077 n. 112.** Substitution of assignee of judgment, on appeal, as respondent, should be denied. *Fox v. Peacock*, 153 App. Div. 887, 138 N. Y. Supp. 535.

**2079 n. 131.** *Dickinson v. Oliver*, 112 App. Div. 806, 99 N. Y. Supp. 432. Where a sheriff died after bringing an action for conversion of property levied on, the action should have been continued by his undersheriff "as undersheriff" and not "as sheriff." *Dickinson v. Oliver*, 195 N. Y. 238, 88 N. E. 44 [affirming mem. decision in 127 App. Div. 932, 111 N. Y. Supp. 1116].

**2080.** Where a husband sues for partition as committee of his wife, and she dies pending the action, she is deemed the real "sole plaintiff" and he is entitled to revive as a "successor in interest," where entitled to curtesy. *Duke v. Abel*, 57 Misc. 371, 109 N. Y. Supp. 662.

**2080 n. 135.** Where an action is abated by the death of plaintiff, no motion can be made in it, or appeal taken or prosecuted, until the action is revived. *Robinson v. Thomas*, 123 App. Div. 414, 107 N. Y. Supp. 1109.

**2081 n. 141.** This Code provision relates to representatives and successors over whom jurisdiction exists in the actions, and which do not include foreign representatives in actions at law. The action cannot be revived against a foreign executor where none of the assets are within the state and no ancillary letters have been issued. *McGrath v. Weiller*, 98 App. Div. 291, 90 N. Y. Supp. 420.

**2082.** A motion to revive an action at law, after limitations have barred the cause of action, where no excuse for the delay is presented, should be denied. *Washington Trust Co. v. Baldwin*, 118 App. Div. 186, 102 N. Y. Supp. 1105 [affirmed on this point in 189 N. Y. 453].

**2083 n. 154.** See also *Folts v. Remington*, 51 Misc. 224, 100 N. Y. Supp. 834.

**2084.** Complaint should be made a part of the moving papers, where plaintiff has died, or the nature of the action

should be fully shown. *Robinson v. Thomas*, 123 App. Div. 411, 107 N. Y. Supp. 1110.

2084 n. 163. *Robinson v. Thomas*, 123 App. Div. 411, 107 N. Y. Supp. 1110.

2086 § 1611. Order granting leave to substituted plaintiff to serve an amended complaint held unauthorized under the particular circumstances. *Robinson v. Thomas*, 123 App. Div. 411, 107 N. Y. Supp. 1110.

2087 n. 187. However, where an action is brought by one as executor and as legatee to determine the validity of a will, and plaintiff dies and no administrator is appointed, it has been held that no substitution of a nominal plaintiff is necessary. *Carolan v. O'Donnell*, 141 App. Div. 463, 126 N. Y. Supp. 551. On death of nonresident defendant not yet served by publication, where he has no administrator in this state, the administrator appointed in the foreign jurisdiction is properly substituted. *Logan v. Greenwich Trust Co.*, 144 App. Div. 372, 129 N. Y. Supp. 577.

2092 n. 226. Consent usually precludes attack on order. *Dickinson v. Oliver*, 112 App. Div. 806, 99 N. Y. Supp. 432.

2092 § 1613. Historical review of legislation, see *Lane v. Fenn*, 76 Misc. 48, 134 N. Y. Supp. 92.

2092 n. 227. Death of coplaintiff does not preclude going on with the trial. *Hawkes v. Claffy*, 122 App. Div. 546, 107 N. Y. Supp. 534.

2092 n. 229. *Latz v. Blumenthal*, 50 Misc. 407, 100 N. Y. Supp. 527.

2093 n. 232. See *Callanan v. Keesville, etc., R. Co.*, 48 Misc. 476, 95 N. Y. Supp. 513.

2093 n. 233. *Latz v. Blumenthal*, 50 Misc. 407, 100 N. Y. Supp. 527. Representatives of a deceased partner are not exempt from suit for a firm debt, nor from being substituted for decedent in an action brought against the firm, until the remedy against the surviving partner is exhausted. *Hentz v. Havemeyer*, 132 App. Div. 56, 116 N. Y. Supp. 317.



Where, in a suit against a firm, a partner dies, and the statute of limitations has expired against the other partners not served, his personal representative may be substituted. *Seligman v. Friedlander*, 199 N. Y. 373, 92 N. E. 1047, [aff. 138 App. Div. 784].

2094 n. 238. Followed in *Latz v. Blumenthal*, 50 Misc. 407, 100 N. Y. Supp. 527.

2095 n. 249. Where plaintiff assigned his interest in a copartnership to one of the defendants, who, together with plaintiff's two former partners and others becoming associated with them at the time, continued the business and plaintiff sued the old and new partners to cancel the assignment on the ground that it was fraudulently procured by the new partners, and demanded an accounting by all of defendants as of the date of the transfer, it was held necessary to revive the action against the representatives of one of the new partners who died after the joinder of issue. *Hausling v. Rheinfrank*, 103 App. Div. 517, 93 N. Y. Supp. 121.

2096 § 1614. Where one of several defendants jointly liable dies, and two of the causes of action abate and one survives, the action can only be revived as a separate action against the representative of the deceased; but an order may be made severing the action with leave to continue the causes of action which abate as to the deceased, against the survivors, and with leave to continue the other cause separately against the representatives of the deceased. *Mulligan v. O'Brien*, 53 Misc. 4, 104 N. Y. Supp. 301.

2096 n. 250. See also *Mulligan v. O'Brien*, 53 Misc. 4, 104 N. Y. Supp. 301. Or if summons has not been served on copartners, the liability being joint and several, plaintiff need not proceed against the latter on the death of the partner served, but may substitute his representative. *Seligman v. Friedlander*, 138 App. Div. 785, 123 N. Y. Supp. 583 [aff. in 199 N. Y. 373].

2096 n. 253. Suit should not be severed against the ob-

jection of plaintiff unless necessary in furtherance of justice. *Lane v. Fenn*, 76 Misc. 48, 134 N. Y. Supp. 92.

**2097** § 1616. The motion, where made by the representatives of a deceased defendant, may be denied because of laches in moving. *Callanan v. Keeseville, etc., R. Co.*, 48 Misc. 476, 95 N. Y. Supp. 513.

**2099** n. 272. *Gruner v. Ruffner*, 59 Misc. 266, 110 N. Y. Supp. 873.

**2099** n. 274. Unless there are other facts besides the succession which should be alleged, the order, on the death of defendant, need not direct a supplemental summons and complaint with leave to answer. *Flannery v. Sahagian*, 109 App. Div. 321, 95 N. Y. Supp. 643.

**2100** § 1619. Substitution of an administrator, after reversal of a judgment on appeal to the Appellate Division, should not be granted, it seems, to enable him to appeal to the Court of Appeals, merely to recover costs. *Pierce v. Supreme Tent, etc.*, 140 App. Div. 730, 125 N. Y. Supp. 658. An order substituting plaintiff's administrator should be based on notice to defendant. *Pierce v. Supreme Tent, etc.*, 140 App. Div. 730, 125 N. Y. Supp. 658.

**2100** n. 279. "Such section applies only to actions which do not abate on death." *Matter of Crandall*, 196 N. Y. 127, 131, 89 N. E. 578.

**2102** § 1620. Where plaintiff in an action for personal injuries dies after judgment for defendant, leaving no estate, his administratrix should not be permitted to prosecute the action and appeal as if it had been originally brought by her. *Matter of Tubbiolo*, 146 App. Div. 323, 130 N. Y. Supp. 776. Where defendant dies after judgment and pending an appeal by him, his executors may be substituted. *Falk v. Have-myer*, 144 App. Div. 688, 129 N. Y. Supp. 608.

**2102** n. 296. Administratrix may be substituted where plaintiff dies pending an appeal. *Schramme v. Lewinson*, 123 App. Div. 662, 107 N. Y. Supp. 1075.

**2103** n. 301. The Code amendment applies only where the reversal is "after" the death of the party. *Molloy v. Starin*, 134 App. Div. 542, 119 N. Y. Supp. 610; *Hughes v. Russell*, 113 App. Div. 744, 99 N. Y. Supp. 203. It does not apply where the reversal is on questions of fact as well as law. *Id.*

## CHAPTER II

### VOLUNTARY DISCONTINUANCE

**2104** § 1621. May be allowed to discontinue causes of action admitted by defendant so as to get a speedy trial on the short cause calendar. *Whitman v. O'Donovan*, 141 N. Y. Supp. 750. Where both parties desire a discontinuance, defendant's motion therefor should be granted, as against the objection of plaintiff's attorney who had commenced the action in violation of instructions, where plaintiff is able and willing to pay his attorney. *Mitchell v. Mitchell*, 143 App. Div. 172, 127 N. Y. Supp. 1065.

**2105.** Defendant not served cannot object. *White v. White*, 84 Misc. 114.

**2106** n. 11. See post, **2121** n. 132.

**2108** n. 29. *Zuckerman v. Witkowski*, 115 N. Y. Supp. 157; *Block v. Ottenberg*, 53 Misc. 647, 103 N. Y. Supp. 739; *Fizburg v. Ramsey*, 49 Misc. 216, 97 N. Y. Supp. 359. See also *American Exchange Nat. Bank v. Smith*, 61 Misc. 49, 113 N. Y. Supp. 236. Application may be denied, where defendant amends its answer so as to make it clear that a counterclaim is intended. *Jeremyn v. Searing*, 139 App. Div. 116, 123 N. Y. Supp. 832.

**2110** § 1625. May discontinue foreclosure suit against a defendant mortgagor who has transferred his interest in the property. *Ross v. Epstein*, 118 N. Y. Supp. 1007. A defendant cannot object to plaintiff discontinuing against a

codefendant who has not appeared. *Gothwald v. Weil*, 68 Misc. 466, 124 N. Y. Supp. 332.

**2113.** Unauthorized stipulation for discontinuance may be set aside at the instance of an innocent infant who is plaintiff. *Heiter v. Joline*, 135 App. Div. 13, 119 N. Y. Supp. 819.

**2113 n. 71.** Ex parte order is proper. *Valentine v. Valentine*, 134 App. Div. 664, 119 N. Y. Supp. 426.

**2114 § 1629.** On a motion at Special Term for leave to discontinue, an absolute order of discontinuance with full costs to defendant is unauthorized. The order can only impose costs as a condition of discontinuance. *Hyde v. Anderson*, 112 App. Div. 76, 98 N. Y. Supp. 62.

**2114 n. 74.** *Jermyn v. Searing*, 139 App. Div. 116, 123 N. Y. Supp. 832. When improper, see *Schlegel v. Roman Catholic Church*, 124 App. Div. 502, 108 N. Y. Supp. 955.

**2114 n. 75.** *Valentine v. Stevens*, 109 App. Div. 284, 96 N. Y. Supp. 299.

**2115 n. 87.** Will not be vacated, although granted ex parte, unless discontinuance is shown to be inequitable to defendant. *Valentine v. Valentine*, 134 App. Div. 664, 119 N. Y. Supp. 426.

**2117.** If costs not awarded on allowing discontinuance, defendant cannot enter judgment for them. *Eisberg v. Cornell*, 154 App. Div. 885, 138 N. Y. Supp. 661.

**2120 n. 125.** As where reason for discontinuance is that plaintiff has sued the wrong defendant. *Reichert v. Walter*, 80 Misc. 402, 141 N. Y. Supp. 266. In divorce suit. *O'Hearn v. O'Hearn*, 3 Current Ct. Dec. 121. While ordinarily, where it is proper to impose costs as a condition, the plaintiff should be required to pay all the taxable costs to the date of the motion, yet the court, in its discretion, may, in a proper case, impose more moderate terms as to costs. *Susman v. Dangler*, 95 App. Div. 158, 88 N. Y. Supp. 527.

Amount of costs, see *Schnabel v. Hanover Nat. Bank*, 141 N. Y. Supp. 223.

**2121 n. 132.** In divorce suit, condition may be imposed that person named as co-respondent be paid an allowance. *Stubbert v. Stubbert*, 66 Misc. 560, 123 N. Y. Supp. 1080. In action by husband to annul a marriage, payment of counsel fee previously ordered may be required as a condition. *Feinberg v. Feinberg*, 140 App. Div. 924, 125 N. Y. Supp. 384.

**2121 n. 133.** *American West Indies Trading Co. v. Porto Rican American Cigar Co.*, 63 Misc. 518, 117 N. Y. Supp. 614.

**2121 n. 134.** This is the rule where the settlement is collusive to defraud plaintiff's attorney. *Rogers v. Marcus*, 93 App. Div. 552, 87 N. Y. Supp. 941. It is not proper, however, where the discontinuance is because of a settlement and the plaintiff is financially responsible, to fix the amount of the attorney's lien and direct the payment to the attorney of the sum fixed, as the condition of allowing a discontinuance. *Witmark v. Perley*, 43 Misc. 14, 86 N. Y. Supp. 756.

**2122 n. 139.** *Jermyn v. Searing*, 139 App. Div. 116, 123 N. Y. Supp. 832. But not where there is no basis for estimating the extra allowance. *Weidenfeld v. Byrne*, 113 App. Div. 410, 99 N. Y. Supp. 271. When improper, see *Schlegel v. Roman Catholic Church*, 124 App. Div. 502, 108 N. Y. Supp. 955.

**2122 n. 140.** It is not proper to vacate an order of discontinuance, where there is no ground therefor, unless plaintiff stipulates not to bring another action and to pay whatever additional allowance the court may grant. *Valentine v. Valentine*, 134 App. Div. 664, 119 N. Y. Supp. 426. So a stipulation not to assign the cause of action is improper. *Telephonine Co. v. Douthitt*, 115 App. Div. 362, 100 N. Y. Supp. 781.

**2123 n. 149.** *Valentine v. Stevens*, 109 App. Div. 284, 96 N. Y. Supp. 299.

## CHAPTER III

## DISMISSAL FOR FAILURE OF PLAINTIFF TO PROCEED

**2124** n. 1. McGrath v. Murtha & Schmohl Co., 128 App. Div. 278, 112 N. Y. Supp. 679. See Stokes v. Phelps Mission, 59 Misc. 256, 112 N. Y. Supp. 237. Rule applied to mandamus proceedings in People ex rel. Arfken v. York, 106 App. Div. 590, 94 N. Y. Supp. 812.

**2125** n. 2. Two months held not unreasonable, although younger issues had been tried. Leap v. Associated Operating Co., 149 App. Div. 859, 134 N. Y. Supp. 823.

**2125** § 1632. Delay held ground. Wilensky v. Philadelphia Casualty Co., 131 N. Y. Supp. 549; Hobermand v. Diamond, 130 N. Y. Supp. 139; Ingri v. Star Co., 134 App. Div. 960, 119 N. Y. Supp. 502. Delay held not ground. United States Fidelity & Guaranty Co. v. Whitman, 138 App. Div. 275, 122 N. Y. Supp. 883. Two years' unexcused delay held ground. Armstrong v. Star Co., 154 App. Div. 320, 138 N. Y. Supp. 959. Four years held ground. Williams v. Jenkin, 76 Misc. 256, 134 N. Y. Supp. 890. Four years' delay held ground especially where defendant had been compelled to pay annual premium on bond given for his release from order of arrest. Manning v. Wanbold, 146 App. Div. 318, 130 N. Y. Supp. 616. Delay of seven years held ground. Ingri v. Star Co., 134 App. Div. 960, 119 N. Y. Supp. 502. Where delay not long continued after mistrial, order improper. Bryon v. Bernstein, 133 N. Y. Supp. 972. Delay held not ground where it was not shown that issue had been joined as to all of the parties. DeLacy v. Kelly, 147 App. Div. 37, 131 N. Y. Supp. 702. Order proper after judgment for plaintiff reversed, where no steps taken to amend complaint in accordance with the reversal. Hoag v. South Dover Marble Co., 143 App. Div. 482, 127 N. Y. Supp. 1094. Unexcused delay until after death of defendant is ground.

*Oehlhof v. Solomon*, 65 Misc. 541, 120 N. Y. Supp. 925. Motion to dismiss should be granted where plaintiff shows no legal excuse for the delay. *Notman v. J. M. Guffy Petroleum Co.*, 128 N. Y. Supp. 20. A dismissal will not be refused merely to protect the attorney's lien, where the claim has been settled. *Crisenza v. Anchmuty*, 121 App. Div. 611, 106 N. Y. Supp. 335. The fact that the defendant has interposed counterclaims in no way affects his right to move for a dismissal for the plaintiff's unreasonable neglect to proceed. *Jacot v. Marks*, 46 App. Div. 531, 61 N. Y. Supp. 1040; *Fleischman v. Mengis*, 113 N. Y. Supp. 515. The fact that the motion is not made until after plaintiff has noticed the case and put it on the calendar warrants the denial of the motion. *Mladinich v. Livingston*, 112 App. Div. 181, 98 N. Y. Supp. 46. Consent to postponements of the trial warrants a denial of the motion. *McHugh v. Metropolitan St. R. Co.*, 51 Misc. 588, 101 N. Y. Supp. 95.

**2125 n. 4.** *Ferber v. Newgold*, 133 App. Div. 741, 118 N. Y. Supp. 214; *Anderson v. Hedden & Sons Co.*, 116 App. Div. 231, 101 N. Y. Supp. 585.

**2125 n. 5.** Twelve years, see *Fleischman v. Mengis*, 113 N. Y. Supp. 515.

**2126.** Where plaintiff has gone into the hands of a receiver, and the receiver has brought a similar action for the benefit of all creditors the event of which plaintiff is awaiting, his action will be dismissed. *Frohmann v. Sherman Square Hotel Co.*, 136 App. Div. 430, 120 N. Y. Supp. 900.

**2127 n. 17.** *Hathorn v. Natural Carbonic Gas Co.*, 83 Misc. 582, 146 N. Y. Supp. 271; *Schulz v. Griffith*, 112 N. Y. Supp. 1054; *Bauer v. Hart*, 122 App. Div. 41, 106 N. Y. Supp. 877. See *St. Paul's Church v. Mt. Vernon Suburban Land Co.*, 119 App. Div. 45, 38 Civ. Proc. R. 323, 103 N. Y. Supp. 858. Excuse held sufficient, see *Schwartz v. Interurban St. R. Co.*, 108 N. Y. Supp. 651. Excuses held insufficient, see *Regan v. Milliken Bros.*, 123 App. Div. 72,

107 N. Y. Supp. 722; *McCardell v. Metropolitan St. R. Co.*, 124 App. Div. 528, 108 N. Y. Supp. 990. Mistaken belief that cause had been put on calendar held no excuse. *Bleiberg v. Ottenberg*, 107 N. Y. Supp. 216. Press of business on the part of plaintiff's attorney is no excuse. *Krauss v. Wood*, 104 N. Y. Supp. 455. Defendant's plea of another action pending no excuse, nor is financial inability of client to pay his attorney his necessary disbursements. *Mladinich v. Livingston*, 112 App. Div. 181, 98 N. Y. Supp. 46. Neglect and forgetfulness of attorney is no excuse. *Meyer v. Crimmins*, 135 App. Div. 911, 120 N. Y. Supp. 353. Neglect of attorney is no excuse after eight years' delay. *Finn v. Scottish Union, etc., Co.*, 137 App. Div. 60, 122 N. Y. Supp. 37. That plaintiff is too poor to pay his attorneys a retainer, and that they refuse to proceed without a retainer is no excuse. *Kachel v. Stutz*, 137 App. Div. 199, 121 N. Y. Supp. 979. Financial difficulties and inability to get away from business is no excuse for delay of four years. *Tuttle v. Dubuque Fire & M. Ins. Co.*, 155 App. Div. 802, 140 N. Y. Supp. 930. Residence in far distant state for a year is no excuse for delay of three preceding years. *Williams v. Jenkins*, 76 Misc. 256, 134 N. Y. Supp. 890. Mistaken belief of attorney that notice of trial had been served and note of issue filed was no excuse. *Diamond v. Kaufmann*, 82 Misc. 396, 143 N. Y. Supp. 730. Illness of plaintiff and members of her family is no excuse. *Hoag v. South Dover Marble Co.*, 143 App. Div. 482, 127 N. Y. Supp. 1094. Pendency of order for plaintiff's examination is no excuse. *Harris v. Reichenbach*, 150 App. Div. 859, 134 N. Y. Supp. 823.

2127 n. 18. Especially where offer of settlement shows plaintiff has a substantial cause of action. *Dome v. Southern R. Co.*, 152 App. Div. 134, 136 N. Y. Supp. 510.

2127 n. 19. That proceedings are stayed by order for a commission to take testimony is an excuse. *Dome v. Southern R. Co.*, 152 App. Div. 134, 136 N. Y. Supp. 510.



**2128 n. 25.** Mannion v. Steffens, 115 N. Y. Supp. 1087. In Mladinich v. Livingston, 112 App. Div. 181, 98 N. Y. Supp. 46, the court relieved the plaintiff by reason of the fact that he had noticed the case for trial and placed it on the calendar prior to the making of the motion by the defendant. Service of notice of trial after the making of the motion to dismiss is ineffectual. Fisher Malting Co. v. Brown, 92 App. Div. 251, 87 N. Y. Supp. 37. Diligence since the making of the motion is no excuse for past negligence. Holtzoff v. Dodge & Olcott Co., 134 App. Div. 353, 119 N. Y. Supp. 47.

**2129 § 1634.** Should not be granted where plaintiff's motion to restore the cause to the general calendar has been granted without objection. Smart v. Erlacher, 142 App. Div. 752, 127 N. Y. Supp. 720. Consent that cause be reserved generally precludes dismissal before it has been restored to the call or day calendar. Seebach v. Fenkart, 131 N. Y. Supp. 578.

**2130 n. 37.** Leave to renew unnecessary where new term of court has intervened. DeLacy v. Kelly, 147 App. Div. 37, 131 N. Y. Supp. 702.

**2130 n. 39.** MacDonnell v. Press Pub. Co., 160 App. Div. 872, 144 N. Y. Supp. 916; Watson v. Loomis, 51 Misc. 227, 100 N. Y. Supp. 958.

**2130 § 1636.** Where a complaint demanding a money judgment only is dismissed for lack of prosecution defendant is entitled to costs as a matter of right. Murthey v. Burke, 121 App. Div. 400, 106 N. Y. Supp. 98. Where the motion to dismiss is not made until after plaintiff has noticed the case and put it upon the calendar, the motion may be denied on condition of the payment of motion costs and a stipulation to try the case when reached without further delay. Mladinich v. Livingston, 112 App. Div. 181, 98 N. Y. Supp. 46.

**2131 n. 49.** See United States Fidelity & Guaranty Co.

v. Whitman, 138 App. Div. 275, 122 N. Y. Supp. 883. But see *Anderson v. Hedden & Sons Co.*, 116 App. Div. 231, 101 N. Y. Supp. 585. But where defendant makes out a clear case entitling him to have the action dismissed, it should not be denied on condition that the cause be immediately placed on the calendar. *Diamond v. Kaufmann*, 82 Misc. 396, 143 N. Y. Supp. 730.

## CHAPTER IV

### FAILURE OF DEFENDANT TO ANSWER

No New Matter Has Been Found for This Chapter

## CHAPTER V

### FAILURE OF PARTY TO APPEAR

No New Matter Has Been Found for This Chapter

## CHAPTER VI

### ADMISSION OF PLAINTIFF'S CLAIM AND SETTING UP OF COUNTERCLAIM

No New Matter Has Been Found for This Chapter



## PART VIII

### TRIAL

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#### CHAPTER I

##### ISSUES, AND MODE OF TRIAL THEREOF

**2138** n. 9. This Code provision is amended by Laws 1909, c. 493, by omitting the exception.

**2138** § 1646. Plaintiff in an action at law by a trustee in bankruptcy to set aside a fraudulent transfer by the bankrupt is entitled to a jury trial. *Allen v. Gray*, 201 N. Y. 504, 94 N. E. 652. Where action to foreclose mechanic's lien fails because it is not alleged that no other action has been brought, but the case is retained for a money judgment, defendant is entitled to a jury trial. *Schwartz v. Klar*, 144 App. Div. 37, 128 N. Y. Supp. 830. Action for partition is triable as of right before a jury, under § 1544 of the Code. *Corbett v. Fleming*, 134 App. Div. 544, 119 N. Y. Supp. 543. See also *Jackson v. Rosenbrock*, 69 Misc. 213, 126 N. Y. Supp. 712; *Lewis v. Butts*, 128 N. Y. Supp. 842.

**2139** n. 13. *Metz v. Maddox*, 121 App. Div. 147, 105 N. Y. Supp. 702.

**2140** n. 26. Where real property has been conveyed by a bankrupt to a creditor to secure a title to the property in the trustee, a resort to a court of equity is necessary to declare void the deed or conveyance or to compel the creditor to reconvey. Such an action is in equity; but where the

property transferred is personal property, and no written instrument is required to be set aside, and no equitable relief is necessary to enable the trustee to recover the property or its value from creditor to whom it has been transferred, the action is one which must be tried by a jury. *Stern v. Mayer*, 99 App. Div. 427, 91 N. Y. Supp. 292.

**2141.** Defendant is entitled to a jury trial in an action on a debt for which plaintiff had given a receipt in full in return for defendant's notes, though plaintiff seeks to have the notes annulled. *Ross v. McCaldin*, 195 N. Y. 210, 88 N. E. 50 [reversing on other grounds 123 App. Div. 13, 107 N. Y. Supp. 381]. Plaintiff cannot, by an assignment of interests in his claim, deprive defendant of his right to a jury trial in an action otherwise an action at law. *Butterly v. Deering*, 102 App. Div. 395, 92 N. Y. Supp. 675.

**2141 n. 29.** Where defendant pleads an equitable counterclaim, plaintiff is not thereby deprived of the right to have the issue of fact made by the complaint and answer thereto tried by a jury; but if defendant wishes a trial of the issues arising on the counterclaim at Special Term, he should move for an order directing separate trials. *Wasserman v. Taubin*, 129 App. Div. 691, 114 N. Y. Supp. 447.

**2141 n. 35.** *Miller v. Edison Elec. Illuminating Co.*, 184 N. Y. 17, 76 N. E. 734 [reversing on other grounds 97 App. Div. 638, 89 N. Y. Supp. 1059].

**2142 n. 36.** The *McNulty* case is distinguished in *Tucker v. Edison Elec. Illuminating Co.*, 100 App. Div. 407, 91 N. Y. Supp. 439, which holds that the action is triable at Special Term, on the ground that in the *McNulty* case it appeared at the time that the jury trial was demanded that the plaintiff had ceased to be entitled to the injunctive relief demanded. See also *Heughes v. Galusha Stove Co.*, 122 App. Div. 118, 106 N. Y. Supp. 606.

**2142 n. 37.** See *Ryan v. Murphy*, 116 App. Div. 242, 101 N. Y. Supp. 553 (holding that there is a right to a jury

trial unless defendant merely demands a dismissal of the complaint or a jury trial is waived).

**2142** § 1647. In divorce suit, see *Fischel v. Fischel*, 121 App. Div. 868, 106 N. Y. Supp. 815.

**2142** n. 38. Right may be waived by conduct or silence. *James L. Wells Co. v. Silverman*, 125 N. Y. Supp. 457.

**2142** n. 39. *Lazier Gas Engine Co. v. Yokom*, 125 N. Y. Supp. 465.

**2143** n. 44. *Ross v. McCaldin*, 195 N. Y. 210, 88 N. E. 50 [reversing on other grounds 123 App. Div. 13, 107 N. Y. Supp. 381]; *Abbott v. Easton*, 195 N. Y. 372, 88 N. E. 572 [reversing on other grounds 122 App. Div. 274, 106 N. Y. Supp. 970]; *James L. Wells Co. v. Silverman*, 125 N. Y. Supp. 457.

**2143** n. 45. See *Werner v. Condensed Milk Co.*, 152 App. Div. 330, 136 N. Y. Supp. 585. Serving cross notice of trial for Special Term, by defendant, in action for divorce, does not waive his right to a trial by jury. *Halgren v. Halgren*, 160 App. Div. 477, 145 N. Y. Supp. 987.

**2143** n. 46. *Spring v. Collins Bldg. & Const. Co.*, 60 Misc. 239, 113 N. Y. Supp. 29; *Reynolds v. Wynne*, 127 App. Div. 69, 111 N. Y. Supp. 248; *Hutchinson v. Ward*, 114 App. Div. 156, 99 N. Y. Supp. 708.

**2146** n. 62. See also *Breck v. United States Title Guaranty & Indemnity Co.*, 128 App. Div. 311, 112 N. Y. Supp. 756.

**2146** n. 64. See also *Page v. Herkimer Lumber Co.*, 109 App. Div. 391, 96 N. Y. Supp. 272.

**2146** n. 65. *Killeen v. Kiernan*, 73 Misc. 21, 130 N. Y. Supp. 647.

**2147** n. 66. *Brightson v. H. B. Claffin Co.*, 108 App. Div. 284, 95 N. Y. Supp. 751.

**2147** n. 70. *Remsen v. New York B. & M. B. R. Co.*, 111 App. Div. 413, 97 N. Y. Supp. 902.

**2147** n. 72. Where a reference is ordered on consent and it proceeds without objection, the right to a jury trial is

waived. *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 105 App. Div. 88, 93 N. Y. Supp. 849.

**2147** n. 73. After reversal of judgment on referee's report, cannot move for a jury trial of one of the issues. *Butterly v. Deering*, 158 App. Div. 181, 142 N. Y. Supp. 1050.

**2148** n. 75. The case of *Preston v. Morrow*, 66 N. Y. 452, should be substituted for the citation given.

**2148** § 1648. In an action at law, where defendant sets up an equitable cause of action as a counterclaim, an order directing separate trials should be moved for, and, where defendant would be entitled to affirmative relief on establishing his counterclaim, the order should direct the equitable issue to be first tried. *Goss v. C. S. Goss & Co.*, 126 App. Div. 748, 111 N. Y. Supp. 115; *Brody, Adler, etc., Co. v. Hochstadter*, 150 App. Div. 527, 135 N. Y. Supp. 550. The proper practice in a case where an equitable counterclaim is interposed in an action at law is to procure an order directing separate trials in the appropriate forum of the separate issues, and when the equitable counterclaim, if established, will determine the whole controversy, the equitable issues should be first tried. *Rubenstein v. Radt*, 133 App. Div. 57, 117 N. Y. Supp. 893. If a legitimate equitable counterclaim, upon the determination of which would depend the prosecution of the main action, is pleaded, then, notwithstanding the fact that an improper note of issue had been filed for the Special Term, the equitable issues may first be tried there, where a motion therefor is promptly made. *Goss v. Goss & Co.*, 126 App. Div. 748, 111 N. Y. Supp. 115; *Cohen v. American Surety Co. of New York*, 129 App. Div. 166, 113 N. Y. Supp. 375. In an action at law, an equitable counterclaim is properly sent to trial at Special Term, although the whole cause should not be so sent if there are issues raised by denials. *Oppenheimer v. Carabaya Rubber & N. Co.*, 145 App. Div. 830, 130 N. Y. Supp. 587. But it seems that if the counterclaim for equitable relief would constitute a com-

plete defense to the action at law, a separate and prior trial of the counterclaim should not be ordered. *Brody, Adler, etc., Co. v. Hochstadter*, 150 App. Div. 527, 135 N. Y. Supp. 550. Alleged equitable counterclaim will not be ordered to be first tried at Special Term where it is available only as a defense. *Deiches v. Western Development Co.*, 157 App. Div. 674, 142 N. Y. Supp. 932. The rule that in an action at law an equitable counterclaim should be first tried should not be applied to an action on a note where an equitable counterclaim for the cancellation and return of the note is interposed. *White v. Shorts*, 154 App. Div. 428, 139 N. Y. Supp. 169.

2148 n. 80. *Loewenthal v. Haines*, 160 App. Div. 503; *Cohen v. American Surety Co. of New York*, 129 App. Div. 166, 113 N. Y. Supp. 375.

2148 n. 81. But in such a case plaintiff is not entitled as of right to a jury trial of the counterclaim. *Killeen v. Kiernan*, 73 Misc. 21, 130 N. Y. Supp. 647.

2149 n. 82. If defendant goes to trial without making such an application, proof should not be permitted in support of purely equitable issues. *New York v. Matthews*, 156 App. Div. 490, 141 N. Y. Supp. 432. But in such a case, if there is no order directing the counterclaim to be tried first and at Special Term, defendant cannot put the cause on the Special Term calendar. *Brody, Adler, etc., Co. v. Hochstadter*, 150 App. Div. 530, 135 N. Y. Supp. 549. Stay of plaintiff's cause of action should be granted until determination of the counterclaim at Special Term. *Johnson v. Johnson*, 157 App. Div. 289, 142 N. Y. Supp. 416.

2149 § 1649. Direction of appellate court for trial of an action to foreclose a lien "as of an action in personam" does not require the case to be put on the trial calendar as distinguished from Special Term. *Levin v. Hessberg*, 3 Current Ct. Dec. 17. When cause of action is more clearly legal than equitable in character, the Special Term may transfer it to



the calendar of the Trial Term. *Ransome Concrete Mach. Co. v. McDonald*, 207 N. Y. 383, 101 N. E. 175 [rev. 146 App. Div. 878, 130 N. Y. Supp. 1127].

**2150.** Action by creditor against his debtor's next of kin, legatees and heirs, is equitable. *Herzog v. Marx*, 58 Misc. 356, 110 N. Y. Supp. 1039.

**2150** n. 90. Code provision is now Cons. Laws, c. 23, § 133.

**2151** n. 101. Contra, under § 3412 of the Code. *Di Menna v. New York*, 155 App. Div. 501, 140 N. Y. Supp. 680.

**2151** n. 106. *Page v. Herkimer Lumber Co.*, 109 App. Div. 391, 96 N. Y. Supp. 272.

**2152** n. 115. *Vandewater v. Mutual Reserve Life Ins. Co.*, 44 Misc. 316, 89 N. Y. Supp. 845. See also vol. 1, p. 1869.

**2154** n. 129. But defendants waive any right to trial in any other forum than that trial term where, though they demand equitable relief, they serve a cross notice of trial for the trial term. *Groden v. Jacobson*, 129 App. Div. 508, 114 N. Y. Supp. 183.

**2155** n. 134. *Ettlinger v. Trustees of Sailors' Snug Harbor*, 122 App. Div. 681, 107 N. Y. Supp. 779.

**2156** n. 136. *Yates v. Yates*, 211 N. Y. 163. Waiver, see *Tietzel v. Tietzel*, 122 App. Div. 873, 107 N. Y. Supp. 878.

**2156** n. 139. *Halgren v. Halgren*, 160 App. Div. 477, 145 N. Y. Supp. 987; *Wilcox v. Wilcox*, 116 App. Div. 423, 101 N. Y. Supp. 828.

**2156** n. 141. See *Wilcox v. Wilcox*, 116 App. Div. 423, 101 N. Y. Supp. 828. By delay, party loses right to demand a jury trial as a matter of right. *Ettlinger v. Trustees of Sailors' Snug Harbor*, 122 App. Div. 681, 107 N. Y. Supp. 779. Rule 31 of the General Rules of Practice was amended in 1910 to read as follows: "In all actions where either party

is entitled to have an issue or issues of fact settled for trial by a jury, either as a matter of right or by leave of the court, if either party desires such a trial, the party must within twenty days after issue joined, give notice of motion that all the issues or one or more specific issues be so tried. If such motion is not made within such time, the right to a trial by jury is waived." The rule as amended has been held unauthorized in so far as it was an attempt to limit the constitutional right to a trial by jury of the issue of adultery in an action for divorce by prescribing a mode of waiver not included in a statutory provision legislating upon the same subject-matter. *Halgren v. Halgren*, 160 App. Div. 477, 145 N. Y. Supp. 987. *Contra*, *Cohen v. Cohen*, 160 App. Div. 240, 145 N. Y. Supp. 652.

**2157** n. 143. *Haff v. Haff*, 132 App. Div. 338, 118 N. Y. Supp. 52. See also *Wilcox v. Wilcox*, 116 App. Div. 423, 101 N. Y. Supp. 828.

**2159** n. 158. May be refused because of congested condition of jury calendar. *Borowsky v. Gallin*, 126 App. Div. 364, 110 N. Y. Supp. 818. Divorce suit. *Haff v. Haff*, 132 App. Div. 338, 118 N. Y. Supp. 52.

**2159** n. 161. This discretion will not be interfered with by the Appellate Division, on appeal, unless there are controlling reasons therefor., *Wurster v. Armfield*, 98 App. Div. 298, 90 N. Y. Supp. 690.

**2160.** In New York county, because of the congested condition of the trial term calendar, issues will not be framed except in an extraordinary case. *Evans v. National Broadway Bank*, 88 App. Div. 549, 85 N. Y. Supp. 101.

**2162** n. 177. This rule was amended in 1910 so as to read as follows: "In all actions where either party is entitled to have an issue or issues of fact settled for trial by a jury, either as a matter of right or by leave of the court, if either party desires such a trial, the party must within twenty days after issue joined, give notice of motion that all the

issues or one or more specific issues be so tried. If such motion is not made within such time, the right to a trial by jury is waived."

**2162** n. 179. Does not apply to divorce suit. *Wilcox v. Wilcox*, 116 App. Div. 423, 101 N. Y. Supp. 828; *Conderman v. Conderman*, 44 Hun, 181; *Haff v. Haff*, 132 App. Div. 338, 118 N. Y. Supp. 52.

**2163** n. 190. *Kelly v. Home Sav. Bank*, 103 App. Div. 141, 92 N. Y. Supp. 578.

**2166.** Section 973 of the Code providing that "The court in its discretion may order one or more issues to be separately tried prior to any trial of the other issues in the case" is added as a complete section by Laws 1907, c. 526. Under § 973, one issue may be tried separately, prior to others, in a proper case. *Pemberton v. McAdoo*, 149 App. Div. 20, 133 N. Y. Supp. 627. It applies to actions where the constitutional right to trial by jury exists. *Smith v. Western Pac. R. Co.*, 203 N. Y. 499, 96 N. E. 1106. This provision, so far as it permits the court to order one or more issues to be separately tried prior to any trial of the other issues is not unconstitutional as applied to actions in which a jury trial is a matter of right. *Smith v. Western Pac. R. Co.*, 203 N. Y. 499, 96 N. E. 1106. Separate trial of issues held proper in partnership suit. *Franklin v. Leiter*, 149 App. Div. 678, 134 N. Y. Supp. 399; *Pemberton v. McAdoo*, 149 App. Div. 20, 133 N. Y. Supp. 627. Separate trial of issues may be first asked for on a fourth trial. *Franklin v. Leiter*, 149 App. Div. 678, 134 N. Y. Supp. 399. Under § 973 of the Code, the issue raised by pleading the statute of limitations may be ordered tried separately. *Smith v. Western Pacific R. Co.*, 144 App. Div. 180, 128 N. Y. Supp. 966.

## CHAPTER II

## INQUESTS

**2169** § 1659. Objections to evidence on inquests must point out specifically the grounds of objection. *Fisher v. South Shore Traction Co.*, 70 Misc. 529, 127 N. Y. Supp. 333. A motion to set aside an assessment of damages is addressed to the discretion of the court, and will not be granted merely because of error in admitting or rejecting evidence, unless the ends of justice were defeated thereby. *Trieber v. New York & Q. C. R. Co.*, 149 App. Div. 804, 134 N. Y. Supp. 267.

**2170** § 1662. See *Pierce, Butler & Pierce Mfg. Co. v. Kleinfeld*, 53 Misc. 260, 103 N. Y. Supp. 86.

**2171** n. 13. *Marchesini v. Scaccianoce*, 110 App. Div. 130, 96 N. Y. Supp. 1095; *Damsky v. Dochterman*, 61 Misc. 597, 114 N. Y. Supp. 170. Contra, in second department, *Warth v. Moore Blind Stitcher & Overseamer Co.*, 125 App. Div. 211, 109 N. Y. Supp. 116.

**2172.** Where the testimony taken upon the inquest clearly shows that the plaintiff failed to prove a cause of action against defendants, the default should be opened. *Davies v. Myers*, 113 N. Y. Supp. 9; *Markel v. Laden*, 117 N. Y. Supp. 916. Sickness of party and refusal of court to grant adjournment is ground. *Irish Industrial Exposition & Amusement Co. v. Sheridan*, 121 App. Div. 922, 106 N. Y. Supp. 392.

**2172** n. 16. *Dana v. Thaw*, 109 N. Y. Supp. 826; *Dana v. Thaw*, 56 Misc. 612, 107 N. Y. Supp. 870; *Clews v. Peper*, 112 App. Div. 430, 98 N. Y. Supp. 404. No affidavit of merits is necessary where the default was because of a delay in receiving notice of trial occasioned by the act of plaintiff or his attorney. *Sears v. Tenhagen*, 50 Misc. 275, 100 N. Y. Supp. 469.

**2172** n. 17. *Iron Clad Mfg. Co. v. Steffen*, 114 App. Div. 792, 100 N. Y. Supp. 196.

**2173** n. 25. *Marchesini v. Scaccianoce*, 110 App. Div. 130, 96 N. Y. Supp. 1095.

**2173** § 1663. But see ante, **560** § 545.

**2174** n. 32. This rule was repealed in 1910 by the General Rules of Practice, evidencing an apparent intention to abolish the practice which had nearly become obsolete. Prior thereto, inquests could be taken in cases where the answer is unverified and no affidavit of merits is served and filed, although the practice was rarely resorted to inasmuch as the affidavit of merits could be served and filed at any time before actual inquest is taken. *Beglin v. People's Trust Co.*, 48 Misc. 494, 95 N. Y. Supp. 910 [citing 2 *Nichols*' N. Y. Pr. 2169-2173].

### CHAPTER III

#### TRIAL BY JURY

**2177** § 1664. Special jury in county having population of a million or more, see Laws 1901, c. 602.

**2180**. Laws 1908, c. 179, amends Laws 1906, c. 484, by adding a new subdivision to subdivision 5 thereof which provides in part that "The judge holding a term may, in his discretion, postpone the whole or a part of the time of service of a trial juror to a later day during the same or a subsequent term. Each juror whose time of service is postponed until a day certain must attend at the opening of court on that day, and thereafter until he is discharged without further notice."

**2180** § 1667. After payment of amount of fine, the court cannot review the amount imposed. The remedy is by appeal. *Allison v. Katz*, 69 Misc. 27, 125 N. Y. Supp. 732.

**2181** § 1668. In Erie county, see Judiciary Law, as am'd by Laws 1911, c. 690, and Laws 1912, c. 147.

**2181** n. 19. Laws 1910, c. 96, amending § 502 of the Judiciary Law, makes an exception as to the counties of Queens and Richmond. Subdivision 3 of section 1027 of the Code is amended by Laws 1907, c. 194, by adding a provision that "except that in the county of Queens a person, to be qualified to serve as such trial juror, shall possess the property qualifications specified in subdivision 3 of section 1126." (See vol. 3, p. 2183, first sentence.)

**2182** nn. 20-23. These Code provisions are now Cons. Laws, c. 30, §§ 502, 598, 599.

**2183** nn. 24-26. These Code provisions are now Cons. Laws, c. 30, §§ 503, 590, 600, 680, 686, and 687.

**2184.** Subdivision 4 is amended by Laws 1904, c. 416, but it is submitted that the change is merely a transposition of words. Subdivision 6 is amended by Laws 1905, c. 436, by adding to those entitled to exemption from jury service the following: "An editor, editorial writer, artist, or reporter of a daily newspaper or press association regularly employed as such and not following any other vocation."

**2185** n. 28. This Code provision is now Cons. Laws, c. 30, § 546.

**2186** n. 29. This Code provision is now Cons. Laws, c. 30, §§ 547, 548.

**2187** nn. 30, 31. These Code provisions are now Cons. Laws, c. 30, §§ 544, 550.

**2191** n. 47. Where several defendants have a common interest and their answers are substantially the same, they are entitled altogether to only six peremptory challenges. *Downey v. Finucane*, 205 N. Y. 251, 98 N. E. 391.

**2193** n. 59. Section 1180 of the Code was amended in 1911 by adding the words "or any actions for damages for injuries to person or property, that he is a shareholder, stockholder, director, officer, or employee, or in any manner interested in any insurance company issuing policies for

protection against liability for damages for injuries to person or property." See also post, **2198** n. 86a.

**2194** n. 62. Juror is not disqualified because he is not positive his preconceived opinion will not influence his verdict. *People v. Star Co.*, 135 App. Div. 517, 129 N. Y. Supp. 498.

**2196** n. 80. For 1911 Code amendment, see ante, **2193** n. 59.

**2197** § 1674. May ask juror if he has any interest in a specific casualty company. *Dulberger v. Gimbel Bros.*, 76 Misc. 225, 134 N. Y. Supp. 574. May ask juror if he has any objections to employing girls in factories, where action is for injuries to girl, on ground of employment under fourteen. *Dresch v. Elliott*, 137 App. Div. 252, 122 N. Y. Supp. 14.

**2198** n. 86a. It is error to allow the jury to be asked, in a personal injury case, whether they are connected with a certain insurance company which insures against accidents. *Lipschutz v. Ross*, 14 Ann. Cas. 52, 84 N. Y. Supp. 32; *Cunningham v. Heidelberger*, 48 Misc. 614, 95 N. Y. Supp. 554, where judgment was reversed because thereof. Contra, *Rinkline v. Acker*, 109 N. Y. Supp. 125. But it is proper, irrespective of the motive of counsel in asking the question, in a personal injury case, to ask the proposed jurors if they are interested, as agents or stockholders, in any corporation insuring against liability for negligence. *Grant v. National R. Spring Co.*, 100 App. Div. 234, 91 N. Y. Supp. 805; *Blair v. McCormack Const. Co.*, 123 App. Div. 30, 107 N. Y. Supp. 750. See also *Banner v. O'Meara*, 110 N. Y. Supp. 947; *Odell v. Genesee Const. Co.*, 145 N. Y. Supp. 125, 129 N. Y. Supp. 122.

**2199** n. 96. Where jury is a special one, drawn under Laws 1901, c. 602, allowance or disallowance of challenges for actual bias are final. *People v. Wolter*, 203 N. Y. 484, 67 N. E. 30.

**2200** n. 100. *Arker v. Cohen*, 136 App. Div. 871, 122 N. Y. Supp. 4.

**2201** § 1678. An application to exclude witnesses from the room is in the discretion of the court. It is often extremely important that witnesses testifying to an accident should be examined without having heard the testimony of other witnesses. What is important is that each person's impression of the occurrence should be stated—not suggested or colored by what he has heard others testify to, and for the court to refuse a request by counsel on either side to exclude all witnesses from the court room except the one under examination closely approaches an abuse of discretion. *Philpot v. Fifth Ave. Coach Co.*, 142 App. Div. 811, 813, 128 N. Y. Supp. 35.

**2203**. When a will is admitted to probate and on appeal an issue is ordered before the Supreme Court as to whether the will in question was revoked by testator, the right to open and close rests with the contestant rather than the proponent of the will. *Matter of Hopkins' Will*, 97 App. Div. 126, 89 N. Y. Supp. 561.

**2204** n. 125. *Kotlowitz v. Silberstein*, 83 Misc. 82, 144 N. Y. Supp. 766; *Hollander v. Farber*, 52 Misc. 507, 102 N. Y. Supp. 506.

**2204** n. 129. Where defendant denies due and timely notice of the action, he is not entitled to open. *Piercy v. Frankfort Marine, etc., Co.*, 142 App. Div. 839, 127 N. Y. Supp. 354.

**2204** n. 130. *Cilley v. Preferred Accident Ins. Co.*, 109 App. Div. 394, 96 N. Y. Supp. 282.

**2205** § 1685. Defendant is entitled to open where he pleads eviction, admits the making of the lease, but denies that any rent was due. *Phyfe v. Dale*, 69 Misc. 637, 126 N. Y. Supp. 92, 2 Civ. Pro. R. (N. S.) 374.

**2205** n. 135. See also *Fischer v. Frohne*, 51 Misc. 578, 100 N. Y. Supp. 1016.



**2208 § 1690.** A new sentence, added at the beginning of Rule 29 of the General Rules of Practice, reads as follows: "In the trial of civil causes, unless the justice presiding or the referee shall otherwise direct, each party shall open his case before any evidence is introduced, and, except by special permission of the court, no other opening by either party shall thereafter be permitted."

**2208 § 1691.** Judgment should not be granted on the opening address of defendant's counsel because he mentions only an alleged defense which is insufficient in law. *Greenbaum v. Grammer*, 71 Misc. 433, 128 N. Y. Supp. 609. Cannot move for judgment on defendant's opening statement to the jury, where answer not demurred to. *Cohen v. Hurwitz*, 127 N. Y. Supp. 341.

**2210 § 1694.** Complaint *prima facie* stating cause of action against all of defendants should not be dismissed as to part of them at close of plaintiff's opening address, where it does not negative cause of action. *Backman v. Rogers*, 153 App. Div. 299, 138 N. Y. Supp. 29. Allegations of complaint are limited by admissions made by plaintiff's counsel during his opening. *Bowman v. Seaman*, 152 App. Div. 690, 137 N. Y. Supp. 568. All the facts alleged are admitted. *Continental Asphalt Paving Co. v. Hudson, etc., R. Co.*, 143 App. Div. 338, 128 N. Y. Supp. 226.

**2210 n. 169.** Compare *Norton v. Wilson*, 155 App. Div. 129, 139 N. Y. Supp. 1047.

**2211 n. 172.** *Eckes v. Stetler*, 98 App. Div. 76, 90 N. Y. Supp. 473; *Darton v. Interborough Rapid Transit Co.*, 125 App. Div. 836, 110 N. Y. Supp. 171.

**2211 n. 173.** Statements made may authorize dismissal although complaint states a cause of action. *Sweeney v. O'Dwyer*, 197 N. Y. 499, 90 N. E. 1129.

**2218 n. 209.** Expressly repealed by Laws 1909, c. 65.

**2218 n. 211.** Laws 1909, c. 65, adds the following Code section:

**“§ 961d. Proof of instrument by submitting disputed and genuine handwriting.** Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial to have made or executed the disputed instrument, or writing shall be permitted and submitted to the court and jury in like manner.”

**2220 n. 223.** This Code section does not authorize the court to direct a view in an action for work done and material furnished. *Buffalo Structural Steel Co. v. Dickinson*, 98 App. Div. 355, 90 N. Y. Supp. 268.

**2223 n. 231.** *Kurz v. Doerr*, 180 N. Y. 88, 91. Action to recover penalty. *Kerin v. New York City R. Co.*, 53 Misc. 568, 103 N. Y. Supp. 769.

**2223 n. 232.** It seems that proof of the bias of a witness may be elicited before his material testimony is given. *Fine v. Interurban St. R. Co.*, 45 Misc. 587, 91 N. Y. Supp. 43.

**2225 § 1710.** Rebuttal as to evidence of one defendant should be confined, by instruction, to such defendant, where applicable only thereto. *McDonald v. Degnon-McLean Cont. Co.*, 140 App. Div. 411, 125 N. Y. Supp. 295.

**2226 n. 243.** Cannot be deprived of right by withdrawal of one of defendants. *Hoffman v. Brooklyn Q. C. & S. R. Co.*, 78 Misc. 507, 138 N. Y. Supp. 577. Witness sought to be impeached by contradictory statements should be allowed to explain. *McKiernan v. Hall*, 65 Misc. 138, 121 N. Y. Supp. 87.

**2227 § 1712.** Where no rights of his adversary can by any possibility be prejudiced, a party in the exercise of judicial discretion should be allowed to reopen his case to supply an omission of proof which occurred through oversight. *Klein v. Sarnoff*, 83 Misc. 447, 145 N. Y. Supp. 88.

**2229.** Ruling on offer of proof where it shuts out all evi-

dence of sufficient defenses is error. *Bronx, etc., Bank v. Garman*, 135 N. Y. Supp. 10.

**2229 § 1714.** If evidence is excluded and afterwards the court changes its ruling so that it becomes admissible, the party must offer it again or he cannot complain of the exclusion. *Zeller v. Leiter*, 114 App. Div. 148, 99 N. Y. Supp. 624.

**2229 § 1715.** In offering exhibit, all of it should be offered. *Meyer v. Bermuda Atlantic Steamship Co.*, 76 Misc. 260, 134 N. Y. Supp. 886. Offer of proof must state purpose for which evidence introduced. *Maslin v. Childs*, 146 App. Div. 174, 130 N. Y. Supp. 902. Stipulation limiting proof held before the court, although not marked or formally offered. *Guzick v. Ressler*, 67 Misc. 447, 123 N. Y. Supp. 78.

**2230 n. 268.** Rule applied to letter. *Borough Development Co. v. Harmon*, 154 App. Div. 689, 139 N. Y. Supp. 362.

**2231.** Where counsel objects to narration by a witness he has the right to have the testimony elicited by question and answer. *Altkrug v. Horowitz*, 111 App. Div. 420, 97 N. Y. Supp. 716.

**2231 § 1719.** It is not necessary to repeat in different forms questions to which an objection has been sustained. *Johnson Service Co. v. MacLernon*, 142 App. Div. 677, 127 N. Y. Supp. 431.

**2232 § 1722.** Cannot refuse to answer on ground that answer might show him guilty of civil contempt in violating an injunction. *Russie Cement Co. v. Woolworth & Co.*, 68 Misc. 454, 125 N. Y. Supp. 82.

**2232 n. 281.** *Chappell v. Chappell*, 116 App. Div. 573, 101 N. Y. Supp. 846; *Cullinan v. Quinn*, 95 App. Div. 492, 88 N. Y. Supp. 963.

**2234 n. 289.** For that reason the Special Term will not set aside a subpoena issued by a commissioner, on the ground

that the witness may be asked incriminating questions. *Matter of Phillips*, 143 App. Div. 522, 128 N. Y. Supp. 1048.

**2235** n. 295. *Hauptman v. New York Edison Co.*, 160 App. Div. 917, 145 N. Y. Supp. 696.

**2235** n. 297. But it is error to refuse to allow one more question to be asked, where request is made in good faith and question is not a repetition nor immaterial. *Carlson v. Peterson*, 150 App. Div. 525, 135 N. Y. Supp. 116.

**2236** n. 300. See *People v. Faber*, 199 N. Y. 256, 92 N. E. 674. The question of qualification of an expert should not be postponed for determination by cross-examination. *Dolan v. Herring-Hall-Marvin Safe Co.*, 105 App. Div. 366, 94 N. Y. Supp. 241.

**2236** n. 303. *Brayman v. Grant*, 130 App. Div. 272, 114 N. Y. Supp. 336.

**2237** n. 305. But compare *Altkrug v. Horowitz*, 111 App. Div. 420, 97 N. Y. Supp. 716.

**2237** n. 308. Where the witness is hostile, and was called under a misapprehension as to what his testimony would be, leading questions are permissible. *Zilver v. Robert Graves Co.*, 106 App. Div. 582, 94 N. Y. Supp. 714.

**2237** n. 310. See *Brand v. Borden's Condensed Milk Co.*, 95 App. Div. 64, 88 N. Y. Supp. 460.

**2237** § 1729. A witness cannot testify from a paper not prepared by him, the source and correctness of which is not shown. *Vichos v. Cuttler*, 133 App. Div. 230, 117 N. Y. Supp. 366.

**2237** n. 312. Followed in *McCarthy v. Meaney*, 183 N. Y. 190, 76 N. E. 36; *Callman v. Bruckenfeld*, 108 N. Y. Supp. 1070.

**2238**. Memorandum itself is not admissible in evidence, see *Berkowsky v. New York City R. Co.*, 127 App. Div. 544, 111 N. Y. Supp. 989; *Garber v. New York City R. Co.*, 92 N. Y. Supp. 722. Where a witness who is not hostile testifies that he did not converse with a named person on a

specified evening, counsel may call his attention to his testimony given on a previous trial. *Hart v. Maloney*, 101 App. Div. 37, 91 N. Y. Supp. 922.

**2238 n. 313.** A witness who testifies as to the price of milk at a certain time may refer to a newspaper for the purpose of refreshing his recollection as to the price of milk at such time, proof having been given that such paper was recognized by milkmen as the standard authority on the exchange price of milk. *Blanding v. Cohen*, 101 App. Div. 442, 92 N. Y. Supp. 93.

**2238 n. 314.** *Taft v. Little*, 178 N. Y. 127, 131, 70 N. E. 211; *Geer v. New York City R. Co.*, 50 Misc. 517, 99 N. Y. Supp. 483 (holding that plaintiff may consult the verified complaint in the action).

**2239 n. 317.** *Morris v. New York City R. Co.*, 91 N. Y. Supp. 16. See *Kinan v. New York Cent. & H. R. R. Co.*, 111 App. Div. 383, 97 N. Y. Supp. 859.

**2239 n. 319.** *Josias v. Nivois*, 56 Misc. 557, 107 N. Y. Supp. 15.

**2240 § 1730.** It is proper to ask an expert the reason for his opinions. *Johnson Service Co. v. Maclernon*, 142 App. Div. 677, 127 N. Y. Supp. 431. May ask whether method adopted by master, in a personal injury case, as set out in hypothetical question, was safe. *Wolfe v. Mosler Safe Co.*, 139 App. Div. 848, 124 N. Y. Supp. 541.

**2240 n. 322.** *Cobb v. United Engineering & Contracting Co.*, 191 N. Y. 475, 84 N. E. 395; *Davis v. Maxwell*, 108 App. Div. 128, 96 N. Y. Supp. 45.

**2240 n. 324.** *Marx v. Ontario Beach H. & A. Co.*, 211 N. Y. 33.

**2241 n. 327.** Facts assumed need not be established beyond controversy, it being sufficient that there is some evidence to support them. *Becker v. Metropolitan Life Ins. Co.*, 99 App. Div. 5, 90 N. Y. Supp. 1007.

**2242 § 1732.** The complaint should not be dismissed be-

cause of plaintiff's failure to properly answer questions on cross-examination where there is no intentional or wilful defiance of the court. *Dougherty v. McCollum*, 112 App. Div. 917, 98 N. Y. Supp. 590.

**2242 n. 337.** "If the plaintiff refused to appear for cross-examination then his testimony could be stricken out on motion." *Wilkinson v. McLeod*, 80 Misc. 220, 221, 140 N. Y. Supp. 1031. Dismissal of proceedings for failure of party to appear for cross-examination, because of illness, is improper. *Beardsworth v. Whitehead*, 137 App. Div. 306, 122 N. Y. Supp. 31.

**2244 § 1738.** That witness is hostile may be shown. *Potter v. Browne*, 197 N. Y. 288, 90 N. E. 812. It is prejudicial error, in a personal injury case, to ask a witness if "he has been promised a job with an insurance company." *Levy v. Mott Iron Works*, 143 App. Div. 7, 127 N. Y. Supp. 506. It is prejudicial error, in a close case, in an action for malicious prosecution, to allow defendant to be asked if there was not an action pending against him for criminal conversation, and as to numerous automobile accidents. *Graham v. Graham*, 142 App. Div. 731, 126 N. Y. Supp. 941. Questions tending merely to prejudice witness in the minds of the jury held improper. *Rothschild v. Weingreen*, 121 N. Y. Supp. 234. As to nature and extent of services, see *McNulty v. Pickelmann*, 141 N. Y. Supp. 521. As to ownership, see *Hamilton v. Smith*, 141 N. Y. Supp. 577.

**2244 n. 351.** *Moore v. Standard Oil Co.*, 155 App. Div. 375, 140 N. Y. Supp. 53. But where within scope of direct examination, it is proper although also tending to establish the case of the cross-examiner. *Barila v. Barila*, 153 App. Div. 238, 137 N. Y. Supp. 1038.

**2245 n. 354.** See also *Rossenbach v. Supreme Ct. of I. O. O. F.*, 184 N. Y. 92, 76 N. E. 1085.

**2245 n. 357.** *Dooling v. New York*, 148 App. Div. 713, 132 N. Y. Supp. 1012.

**2246.** A witness may be asked how much he has been paid to testify where he admits having been paid. *Brown v. Interurban St. R. Co.*, 43 Misc. 374, 87 N. Y. Supp. 461.

**2246 n. 364.** *Harding v. Conlon*, 159 App. Div. 441, 144 N. Y. Supp. 663.

**2246 n. 367.** *Hirsh v. American Dist. Tel. Co.*, 92 N. Y. Supp. 794.

**2247.** Ordinarily, a party may show how his adversary's witness was known or discovered, by whom he was subpoenaed, how he has demeaned himself during the trial, with whom he has associated or held converse, and any other circumstances which, like these, may indicate whether the witness is indifferent or more or less a partisan. *Iaquinto v. Bauer*, 93 N. Y. Supp. 388.

**2247 n. 368.** See also *Lederer v. Lederer*, 108 App. Div. 228, 95 N. Y. Supp. 623.

**2247 n. 373.** *Nathan v. Uhlmann*, 101 App. Div. 388, 92 N. Y. Supp. 13.

**2248 n. 380.** *McGurk v. New York City R. Co.*, 47 Misc. 392, 93 N. Y. Supp. 1081.

**2251 n. 402.** *Gleason v. Metropolitan St. R. Co.*, 99 App. Div. 209, 90 N. Y. Supp. 1025.

**2251 n. 404.** *Sexton v. Onward Const. Co.*, 93 App. Div. 143, 87 N. Y. Supp. 550. Counsel may show in full what has been brought out in part on the cross-examination. *Sexton v. Onward Const. Co.*, 93 App. Div. 143, 87 N. Y. Supp. 550.

**2252 n. 409.** To same effect, see *McKiernan v. Hall*, 65 Misc. 138, 121 N. Y. Supp. 87.

**2252 § 1852.** Parties to a divorce suit cannot agree on a referee to take testimony to be used on a reference ordered by the court on application for judgment. *White v. White*, 66 Misc. 592, 123 N. Y. Supp. 1082.

**2254 § 1744.** Evidence of bad character is not admissible, especially specific instances. *Harding v. Conlon*, 159 App. Div. 441, 144 N. Y. Supp. 663.

**2255** n. 430. Admission on cross-examination of conviction of crime does not authorize party to introduce evidence as to his good reputation. *Derrick v. Wallace*, 160 App. Div. 681, 145 N. Y. Supp. 585.

**2256** § 1745. If witness admits signing a sworn type-written statement which is contradictory to his evidence, it is admissible although he also states that he did not read it over or swear to it. *Larkin v. Nassau Electric R. Co.*, 205 N. Y. 267, 98 N. E. 465. A written statement made by a witness before trial, offered to impeach his testimony, should not be excluded on a general objection to its materiality and competency, although part of it did not tend to impeach the witness. *Archbold v. Joline*, 114 N. Y. Supp. 169. General rules stated at length, see *Larkin v. Nassau Electric R. Co.*, 205 N. Y. 267, 98 N. E. 465.

**2256** n. 436. *Hanselman v. Broad*, 113 App. Div. 447, 99 N. Y. Supp. 404.

**2256** n. 437. *Conselyea v. Van Dorn*, 114 N. Y. Supp. 61; *Ruemer v. Clark*, 121 App. Div. 231, 105 N. Y. Supp. 659.

**2256** n. 438. *McKiernan v. Hall*, 65 Misc. 138, 121 N. Y. Supp. 87. See also *Loughlin v. Brassil*, 187 N. Y. 128, 79 N. E. 854.

**2257**. The evidence of contradictory statements may consist of written declarations. *Fox v. Erbe*, 100 App. Div. 343, 91 N. Y. Supp. 832. A judgment roll and an examination in supplementary proceedings, which contained declarations of a party inconsistent with those given upon a trial which sought to set aside a transfer as fraudulent, are not only admissible against the person making them but also against other parties to the action as bearing upon the credibility of the witness. *Id.*

**2258** n. 447. *McKiernan v. Hall*, 65 Misc. 138, 121 N. Y. Supp. 87; *Hanselman v. Broad*, 113 App. Div. 447, 99 N. Y. Supp. 404.

**2258** n. 449. When it is necessary that the whole of the



contradictory writing be read in evidence, see full discussion in *Hanlon v. Ehrich*, 178 N. Y. 474, 71 N. E. 12.

**2259** n. 451. *Potter v. Browne*, 197 N. Y. 288, 90 N. E. 812; *Com. v. Bergmann*, 145 App. Div. 218, 129 N. Y. Supp. 1049; *Wimmer v. Metropolitan St. R. Co.*, 92 App. Div. 258, 86 N. Y. Supp. 1052; *Goldberg v. Metropolitan St. R. Co.*, 84 N. Y. Supp. 211.

**2260** n. 460. See *Potter v. Browne*, 197 N. Y. 288, 90 N. E. 812.

**2260** n. 461. Cannot produce record of conviction afterwards reversed. *People v. Van Zile*, 80 Misc. 329, 141 N. Y. Supp. 168.

**2261** n. 463. But jury is not obliged to accept evidence as true. *Clancy v. New York, N. H. & H. R. Co.*, 128 App. Div. 141, 112 N. Y. Supp. 541.

**2261** § 1748. Cross-examination outside scope of direct examination precludes cross-examiner from contradicting such testimony. *Mitnick v. Nassau Electric R. R. Co.*, 138 App. Div. 576, 123 N. Y. Supp. 331.

**2261** n. 465. *Taylor v. Nichols*, 134 App. Div. 787, 119 N. Y. Supp. 1042; *Berkowsky v. New York City R. Co.*, 127 App. Div. 544, 111 N. Y. Supp. 989; *O'Doherty v. Postal Tel. Cable Co.*, 113 App. Div. 636, 99 N. Y. Supp. 351. Except where witness is the opposing party. *Power v. Brooklyn Heights R. Co.*, 157 App. Div. 400, 142 N. Y. Supp. 592. A party cannot use a signed statement which he has procured from one of his own witnesses before trial to impeach the testimony of the witness upon the trial of the action. *Bernstein v. Empire Bridge Co.*, 146 App. Div. 529, 131 N. Y. Supp. 129.

**2261** n. 466. *Hetzel v. Easterly*, 96 App. Div. 517, 89 N. Y. Supp. 154.

**2262** n. 468. *Webster v. Richmond Light & R. Co.*, 158 App. Div. 210, 143 N. Y. Supp. 57; *De Noyelles v. Delaware Ins. Co.*, 78 Misc. 649, 138 N. Y. Supp. 855.

**2263** n. 472. A party is not precluded from showing bias of the witness, or that his recollection of the occurrence was unreliable, because of the fact that he was first called by him; the witness' first material testimony having been elicited by the opposing party. *Fine v. Interurban St. R. Co.*, 45 Misc. 587, 91 N. Y. Supp. 43.

**2263** n. 476. *Ruhl v. Heintze*, 97 App. Div. 442, 89 N. Y. Supp. 1031. See *National City Bank v. Pacific Co.*, 117 App. Div. 12, 101 N. Y. Supp. 1098. But see *Power v. Brooklyn Heights R. Co.*, 157 App. Div. 400, 142 N. Y. Supp. 592. Admissions of the party may be shown where admissible as evidence of the facts contained therein as distinguished from the sole purpose of impeachment. *Gould v. John Hancock Mut. Life Ins. Co.*, 114 App. Div. 312, 99 N. Y. Supp. 833.

**2264** n. 477. *Greenbaum v. Greenfield*, 114 N. Y. Supp. 832.

**2264** § 1749. Where the court has distinctly stated that it will exclude a certain class of evidence and has permitted an exception to be taken without requiring the precise questions to be asked, the exception presents the correctness of the ruling. *Corrigan v. Funk*, 109 App. Div. 846, 96 N. Y. Supp. 910. Objections to competency of witness cannot be first urged as ground for reversal. *Richie v. Shepard*, 158 App. Div. 192, 143 N. Y. Supp. 19.

**2264** § 1750. If evidence is excluded on certain objections, the party obtaining its exclusion cannot introduce the same kind of evidence. *Electric Carriage Call, etc., Co. v. Herman*, 67 Misc. 394, 123 N. Y. Supp. 231. Erroneous rejection of evidence is not cured by subsequent admission which deprives party of opportunity to cross-examine. *Ritchey v. Pakas*, 136 App. Div. 879, 121 N. Y. Supp. 834. Where evidence is admitted against one defendant only, application is necessary to extend it to other defendants. *Voorhees v. Unger*, 151 App. Div. 35, 135 N. Y. Supp. 113.

**2265 n. 483.** *Carey Printing Co. v. Toilettes Fashion Co.*, 135 App. Div. 441, 120 N. Y. Supp. 436. Where there is no objection to evidence on the ground that it tends to prove a different cause of action from the one pleaded, the variance cannot be taken advantage of for the first time by a motion to dismiss at the close of plaintiff's evidence. *Bauman v. Tannenbaum*, 125 App. Div. 770, 110 N. Y. Supp. 108.

**2265 n. 484.** *Geiger v. Rapaport*, 79 Misc. 5, 130 N. Y. Supp. 55. Motion for new trial on that ground is sufficient. *Salmon v. M. E. Vlazier Mfg. Co.*, 123 App. Div. 171, 108 N. Y. Supp. 448.

**2265 n. 485.** *Kennedy v. John N. Robins Co.*, 154 App. Div. 819, 139 N. Y. Supp. 745; *Cullinan v. Horan*, 116 App. Div. 711, 102 N. Y. Supp. 132; *Blake v. Meyer*, 110 App. Div. 734, 97 N. Y. Supp. 424; *Buckley v. Westchester Lighting Co.*, 93 App. Div. 436, 87 N. Y. Supp. 763.

**2266.** Sufficiency of objection to competency of physician to testify as to confidential communications, see *Mulligan v. Sinski*, 156 App. Div. 35, 140 N. Y. Supp. 835.

**2266 n. 490.** See also *Gurski v. Doscher*, 112 App. Div. 345, 98 N. Y. Supp. 588.

**2267.** Objection to evidence as hearsay is necessary. *Fisher v. Wakefield Park Realty Co.*, 135 App. Div. 808, 120 N. Y. Supp. 129; *Mieuli v. New York & Q. County R. Co.*, 136 App. Div. 373, 120 N. Y. Supp. 1078.

**2267 n. 497.** An objection to evidence on the ground of "irrelevancy" is sufficient where it is clearly "incompetent." *Gearty v. New York*, 183 N. Y. 233, 76 N. E. 12.

**2267 n. 501.** Competency as expert. *Kenks v. Thompson*, 179 N. Y. 20, 71 N. E. 266.

**2267 n. 502.** See also *Lessler v. DeLoyres*, 150 App. Div. 868, 135 N. Y. Supp. 948.

**2268 n. 504.** *Gerry v. Siebrecht*, 84 N. Y. Supp. 250.

**2268** n. 507. *Reed v. Spear*, 107 App. Div. 144, 94 N. Y. Supp. 1007.

**2269** n. 520. *Fox v. Erbe*, 100 App. Div. 343, 91 N. Y. Supp. 832.

**2270** n. 523. *Scott v. Dillon*, 58 Misc. 522, 109 N. Y. Supp. 877; *Schutz v. Union R. Co.*, 181 N. Y. 33, 36; *Date v. New York Glucose Co.*, 104 App. Div. 207, 93 N. Y. Supp. 249; *Davis v. Reflex Camera Co.*, 105 App. Div. 96, 93 N. Y. Supp. 844; *Bjorkegren v. Kirk*, 53 Misc. 560, 103 N. Y. Supp. 994. Compare *Malcomson v. Monaton Realty Investing Corp.*, 154 App. Div. 694, 139 N. Y. Supp. 405.

**2270** n. 530. In a case where it is the practice to allow but one expert witness on a side, the calling another expert after the sustaining an objection to the deposition of an expert on the ground that he was not shown to be qualified, does not waive the exception to the ruling. *Wallach v. Manhattan El. R. Co.*, 105 App. Div. 422, 94 N. Y. Supp. 574.

**2271** n. 532. *Mance v. Hossington*, 205 N. Y. 33, 98 N. E. 203. The rule is different, however, where the court states its intention to strike out the evidence to which the party objects because he desires to rebut it. *Fox v. Metropolitan St. R. Co.*, 93 App. Div. 229, 87 N. Y. Supp. 754.

**2271** n. 535. Moreover, the ruling cannot be reviewed until after verdict. *Bahnsen v. Horwitz*, 90 N. Y. Supp. 428.

**2271** § 1751. Motion to strike out, and asking judge to instruct jury to disregard, is necessary to avoid objection, where answer to question unexpectedly brings out incompetent matter. *Simpson v. Foundation Co.*, 201 N. Y. 479, 95 N. E. 10. Testimony of a witness that he has a mere impression that he did a certain thing should be stricken. *Tichnor Bros., Inc., v. Barley*, 72 Misc. 638, 132 N. Y. Supp. 243. Where evidence insufficient to establish a counterclaim, it should be stricken out on the request of defendant.

*Wilkesbarre Realty Co. v. Atkins*, 142 N. Y. Supp. 324. Where a certain issue is withdrawn, the evidence in regard thereto should be stricken out. *Curran v. Hosey*, 153 App. Div. 557, 138 N. Y. Supp. 910. Propriety in particular case, see *Manor Realty Co. v. Egbert*, 153 App. Div. 904, 138 N. Y. Supp. 502.

2271 n. 536. *O'Brien v. New York City R. Co.*, 55 Misc. 228, 105 N. Y. Supp. 238. Striking out evidence of witness as to his "impression," see *Tichnor Bros. v. Barley*, 149 App. Div. 399, 134 N. Y. Supp. 259.

2272. In the absence of a motion to strike out evidence not called for by the question asked, no reversal will be granted because of such evidence. *Roseblatt v. Joseph M. Cohen House Wrecking Co.*, 91 App. Div. 413, 86 N. Y. Supp. 801.

2273 n. 546. A motion to strike an irresponsible answer may be made by either party. *Kramer v. Haeger Storage Warehouse Co.*, 123 App. Div. 316, 108 N. Y. Supp. 1.

2273 n. 548. After denying a motion to strike out certain testimony, the court may strike it out of its own motion. *Gaebler v. Brooklyn Heights R. Co.*, 130 App. Div. 881, 114 N. Y. Supp. 585.

2273 n. 549. *Malcomson v. Monaton Realty Investing Corp.*, 154 App. Div. 694, 139 N. Y. Supp. 405; *Pesica v. Societa Co-Op., etc.*, 91 App. Div. 506, 86 N. Y. Supp. 952; *Walker v. McCormick*, 88 N. Y. Supp. 406. Failure to object is not fatal where the answer is not responsive. *Helmken v. New York*, 90 App. Div. 135, 85 N. Y. Supp. 1048. Evidence not objected to should not be stricken out, but the remedy is to ask the court to instruct to disregard it. *Terwilliger v. Long Island R. Co.*, 152 App. Div. 168, 136 N. Y. Supp. 533.

2274 n. 562. See *Rubenstein v. Radt*, 133 App. Div. 57, 117 N. Y. Supp. 893. But the motion is timely though not made until the close of the testimony where the in-

admissibility of the evidence could not be known until the evidence was all in. *Wilkins v. Nassau Newspaper Delivery Co.*, 98 App. Div. 130, 90 N. Y. Supp. 678.

**2275** n. 565. *Powell v. Hudson Valley R. Co.*, 88 App. Div. 133, 84 N. Y. Supp. 337.

**2276** § 1753. Improper questions, where evidence equally balanced, not cured by admonishing attorney. *Vibbard v. Kinser Const. Co.*, 147 App. Div. 343, 131 N. Y. Supp. 717.

**2276** n. 575. Error in allowing improper cross-examination held not cured by charge to disregard. *National Supply Co. v. Jebb*, 142 App. Div. 256, 127 N. Y. Supp. 52.

**2276** n. 577. *Fox v. Metropolitan St. R. Co.*, 93 App. Div. 229, 87 N. Y. Supp. 754. But see *Chernick v. Independent American Ice Cream Co.*, 66 Misc. 177, 121 N. Y. Supp. 352.

**2277** n. 578. Failure to strike out until just before the judge's charge is to be delivered does not cure the error. *Harkins v. Queen Ins. Co.*, 106 App. Div. 170, 94 N. Y. Supp. 140.

**2277** § 1754. Discovery during trial that one of jurors had recently been convicted of an indecent assault on a woman is ground for withdrawal of a juror. *Grant v. N. Y. Herald Co.*, 138 App. Div. 727, 123 N. Y. Supp. 448. "It is undoubtedly true, as an abstract proposition, that the court at Special Term has no power to entertain or pass upon a motion to withdraw a juror in an action pending and on trial at the Trial Term. The only person who can entertain such a motion is the justice presiding at the trial. In the present case it was the justice presiding at the trial who heard the application and who granted the motion, and it was a purely harmless irregularity that he happened to be sitting in the Special Term room when he heard the motion and that this order should recite that it was made at Special Term, and should be in the form of a court order. No doubt if

defendant had taken the objection that the Special Term had no power to hear the motion (as he did not on the record) the justice presiding would have entitled the order as having been made at Trial Term. The rules of practice and procedure are established with a view to the promotion of justice and the prompt disposal of litigation, and while they are not to be ignored, they should not be given a strained and technical interpretation and application which may serve to defeat the ends of justice and prolong litigation. The objection that the motion was not one which could not be made at Special Term should have been made, if at all, when it came on for hearing, and not having been so made must be deemed to have been waived. At all events the motion was heard and decided by the only justice who had power to hear and decide it, and it made little or no difference where he sat at the time." *Schultze v. Huttlinger*, 150 App. Div. 489, 491, 135 N. Y. Supp. 70. Application not too late where action is still pending after close of testimony on motion for nonsuit submitted on briefs. *Schultze v. Huttlinger*, 150 App. Div. 489, 135 N. Y. Supp. 70.

**2278** n. 586. *Adler v. Lesser*, 110 N. Y. Supp. 196. Discretion rarely reviewed on appeal. *Schultz v. Huttlinger*, 150 App. Div. 489, 135 N. Y. Supp. 70.

**2278** n. 588. Trial court, on allowing withdrawal of juror to apply to Special Term to amend a pleading, cannot determine the amount of costs which should be awarded by the Special Term. *Smith v. Luckenback*, 158 App. Div. 485, 143 N. Y. Supp. 592.

**2279** § 1756. On motion to dismiss the complaint, the only question is whether plaintiff has made out a prima facie case; the truth of the testimony is not to be considered. *Einhorn v. Derby Co.*, 132 N. Y. Supp. 327.

**2280.** A dismissal of a complaint in an action at law, is equivalent to a nonsuit, which, in effect, is a determination that the plaintiff's evidence is not sufficient to sustain his

cause of action. But after the defendant has been heard, and his evidence taken, if upon all the evidence the plaintiff has established no cause of action, the proper disposition of the case is a direction of a verdict for the defendant and not a dismissal of the complaint, since in an action at law a dismissal of the complaint does not determine the merits of the action. *Niagara Fire Ins. Co. v. Campbell Stores*, 101 App. Div. 400, 92 N. Y. Supp. 208; *Stumpf v. Hallahan*, 101 App. Div. 383, 91 N. Y. Supp. 1062. "In an action at law, after the parties have had the opportunity of exhausting their evidence and have rested, the motion to dismiss the complaint is improper, and, when used by a defendant, must be deemed, as its form and grounds indicate the intention of counsel, a motion for a nonsuit or a direction of a verdict." *Porges v. United States Mortgage, etc., Co.*, 203 N. Y. 181, 96 N. E. 424. "Strictly speaking, there is no such thing as a dismissal on the merits of a complaint in an action at law on a trial before a court and a jury. The appropriate proceeding is the direction of a verdict in favor of defendant." *Strodl v. Farish-Stafford Co.*, 67 Misc. 402, 403, 122 N. Y. Supp. 609.

2280 n. 593. *Rothfuss v. Koehler Sporting Goods Co.*, 129 N. Y. Supp. 28; *Crawford v. General Storage, etc., Co.*, 129 N. Y. Supp. 34; *Rothenberg v. Rosenberg*, 57 Misc. 653, 108 N. Y. Supp. 678; *Eidlin v. State Bank*, 107 N. Y. Supp. 53; *Mittleman v. New York City R. Co.*, 56 Misc. 599, 107 N. Y. Supp. 108. See *Brown v. Grossman*, 128 App. Div. 496, 112 N. Y. Supp. 827. There is no authority for dismissing a complaint upon the merits on a motion for a nonsuit at the close of the plaintiff's case, or at the close of the entire evidence, in an action triable and tried before a jury. *Harris v. Buchanan*, 100 App. Div. 403, 91 N. Y. Supp. 484; *Crecilius v. City of New York*, 114 App. Div. 801, 100 N. Y. Supp. 314; *Hyman v. New York Mortgage & Security Co.*, 128 App. Div. 254, 112 N. Y. Supp. 669. It is error to dismiss on the



merits at the close of plaintiff's case. *Gross v. Foster*, 134 App. Div. 243, 118 N. Y. Supp. 889.

2280 n. 595. *Blyth v. Quinby & Co.*, 148 App. Div. 871, 133 N. Y. Supp. 602; *Rosenblum v. Friedman*, 147 App. Div. 5, 131 N. Y. Supp. 692. Same rule applies to dismissal of counterclaim. *Shea v. Oussani*, 134 N. Y. Supp. 522. Court has no power, after verdict, on reserved motion for a nonsuit, to dismiss the complaint "on the merits." *Bail v. New York, N. H. & H. R. Co.*, 201 N. Y. 355, 94 N. E. 383.

2280 n. 597. See also *Clark v. Scovill*, 133 App. Div. 821, 118 N. Y. Supp. 235.

2281 n. 599. *Koerner v. Balteransky*, 156 App. Div. 918, 141 N. Y. Supp. 1127. Where plaintiff offers to prove certain facts, all of which constitute competent proof under the complaint which states a good cause of action, but also offers to introduce proof of facts competent only as evidence in rebuttal in the event of the defendant seeking to establish certain allegations of his answer, it is erroneous for the trial court to sustain an objection thereto and dismiss the complaint. The plaintiff should be permitted to introduce all evidence competent under the complaint as framed and the offer; the defendant should then be required to put in his proofs and thereafter the plaintiff permitted to introduce his evidence in rebuttal. *Auten v. Bennett*, 183 N. Y. 496, 76 N. E. 609.

2281 n. 603. Where undisputed facts are same as on the first trial, and appellate court had reversed on such facts a judgment for defendant, a verdict for plaintiff should be directed. *Tanenbaum v. Boehm*, 135 App. Div. 286, 120 N. Y. Supp. 392. Uncontradicted evidence of interested witnesses as ground, see *Abramovitz v. Tenzer*, 144 App. Div. 170, 128 N. Y. Supp. 951.

2282 n. 604. *Sabine v. Paine*, 148 App. Div. 730, 132 N. Y. Supp. 813.

2283 n. 609. As where indefinite estimates of measure-

ment are met by demonstrative evidence of actual measurements. *Lalor v. New York*, 208 N. Y. 431, 102 N. E. 508.

2283 n. 610. *De Noyelles v. Delaware Ins. Co.*, 78 Misc. 649, 138 N. Y. Supp. 855; *Oppenheimer v. Mittenthal*, 107 N. Y. Supp. 48.

2284 § 1759. It is error to dismiss the case for failure of proof and at the same time refuse to permit other witnesses to testify for plaintiff. *Halprin v. Sarner*, 117 N. Y. Supp. 995. "Where one of the parties to an action calls his opponent as a witness and proves by him facts tending to sustain his case, and such witness in his own behalf afterwards gives an explanation of the circumstances, which, if true, repels the idea of liability on the part of the defendant, and though such explanation is not disputed by other evidence, this does not authorize the court to take the case from the jury; it is for them to determine what degree of faith is to be given to the explanatory testimony." *Sharp v. Erie R. Co.*, 184 N. Y. 100, 106, 76 N. E. 923. On a question of value of services, a verdict should not be directed. *Steele v. Hammond*, 136 App. Div. 667, 121 N. Y. Supp. 589. Where incompetent evidence presents question of fact, nonsuit is improper. *Gross v. R. & S. Outfitting Co.*, 140 N. Y. Supp. 115. Evidence admitted over objection, although perhaps erroneously, must be considered. *Kumin v. United Waste Mfg. Co.*, 153 App. Div. 498, 138 N. Y. Supp. 82. "Where the defendant has the affirmative and plaintiff moves for a direction of a verdict on the pleadings and on defendant's opening and also for a dismissal of the counterclaim, it is improper practice for the court to direct a verdict for the plaintiff forthwith and reserve decision on the motion to dismiss the counterclaim, as, in the event of a denial of the motion to dismiss the counterclaim, the verdict for plaintiff would be premature." *Carlew v. McGuire*, 69 Misc. 639, 640, 126 N. Y. Supp. 86.

**2284** n. 616. *Wiertz Silk Mfg. Co. v. Louis Metzger & Co.*, 139 N. Y. Supp. 926.

**2284** n. 617. *Wynn v. Provident Life & I. Co.*, 206 N. Y. 701, 99 N. E. 800.

**2284** n. 619. *New York Evening Journal Pub. Co. v. William F. Simpson Advertising Agency*, 56 Misc. 347, 106 N. Y. Supp. 858.

**2286** n. 634. *Engel v. New York City R. Co.*, 55 Misc. 203, 105 N. Y. Supp. 80; *Mendoza v. Levy*, 111 App. Div. 449, 97 N. Y. Supp. 753; *Rapone v. Illinois Surety Co.*, 138 N. Y. Supp. 1102. Witnesses need not be directly interested. Rule applies where there is indirect interest, such as employer and employee, attorney and clerk, or husband and wife. *Matter of Kindberg*, 207 N. Y. 220, 100 N. E. 789.

**2287** n. 635. *Molloy v. Whitehall Portland Cement Co.*, 116 App. Div. 839, 102 N. Y. Supp. 363. See *Wood v. Wise*, 153 App. Div. 223, 137 N. Y. Supp. 1017.

**2291** n. 661. *Rising v. Town of Moreau*, 68 Misc. 284, 125 N. Y. Supp. 249; *Burrowes Co. v. Rapid Safety Filter Co.*, 49 Misc. 539, 97 N. Y. Supp. 1048. Grounds not specified cannot afterwards be relied on. *Crissman v. Erie R. Co.*, 123 App. Div. 61, 107 N. Y. Supp. 827. If defects in proof might have been obviated, motion not pointing out the defect cannot be sustained. This applies equally well to a motion to direct a verdict. *Ramsay v. Miller*, 202 N. Y. 72, 95 N. E. 35.

**2291** n. 665. *Bonny v. New York*, 156 App. Div. 287, 141 N. Y. Supp. 8. See *Armenti v. Brooklyn Union Gas Co.*, 157 App. Div. 276, 142 N. Y. Supp. 420.

**2292** § 1762. In directing a verdict, court cannot pass on submitted findings of fact. *Columbia-Knickerbocker Trust Co. v. Miller*, 156 App. Div. 810, 142 N. Y. Supp. 440. Where a verdict is directed for plaintiff, the court cannot, after the jury is discharged, set aside the verdict and grant one for defendant, but can grant a new trial. *Wilson &*

*Baillie Mfg. Co. v. City of New York*, 122 App. Div. 621, 107 N. Y. Supp. 524. On directing a verdict for plaintiff, the court should deduct from the verdict so directed the amount of a counterclaim arising out of a distinct transaction pleaded by defendant, or should permit defendants to introduce evidence in support of their counterclaim, and, if established, then deduct the amount thereof. *Crane Co. v. Collins*, 103 App. Div. 480, 93 N. Y. Supp. 174. Section 1190 of the Code is amended by Laws 1907, c. 502, by adding the following sentence: "The court may, upon the application of either party, exclude from the court room the jurors sitting in an action during the argument of a motion for nonsuit, dismissal of the complaint or direction of a verdict."

2292 n. 670. *Fitzgerald v. Russell*, 155 App. Div. 854, 140 N. Y. Supp. 519; *Hoover v. Woodruff*, 153 App. Div. 447, 138 N. Y. Supp. 239.

2292 n. 671. *Cannon v. Fargo*, 138 App. Div. 20, 122 N. Y. Supp. 576.

2293. "The right to move for a nonsuit does not exist after verdict, but when the motion was made before the verdict and the decision thereof expressly reserved by the court, with the consent of the parties, until after the verdict, the court may then, notwithstanding the verdict, render its decision upon the motion and cause judgment to be entered thereon. This has been the practice in the courts of this state for many years." *Bail v. New York, etc., R. Co.*, 201 N. Y. 355, 94 N. E. 383. Where motion to dismiss complaint made at the close of all the testimony should have been granted, there is no available error in reserving the decision thereon against plaintiff's objections and granting it after verdict. *Blyth v. Quinby & Co.*, 148 App. Div. 871, 133 N. Y. Supp. 602. Where decision of motion reserved until after verdict, and motion then granted, the effect is the same as if there had been no verdict. *Pierce v. Atlantic Gulf & Pacific Co.*, 159 App. Div. 258, 144 N. Y. Supp. 330.

Where, at the close of the case, defendant renewed its motion to dismiss the complaint but the court reserved decision, to which no objection was made, and sent the case to the jury, and thereafter defendant moved to set aside the verdict and for a new trial on the merits but the court reserved decision and subsequently denied the motion,—there is no waiver by not objecting and taking an exception to the court's action in reserving decision. *Smith v. Long Island R. Co.*, 129 App. Div. 427, 114 N. Y. Supp. 228. "At the close of the evidence the defendant asked for a directed verdict in his favor upon the counterclaim. The trial judge submitted the question upon one of the counterclaims, and reserved for his own decision the question raised by the other counterclaim. To this an exception was taken. But no request was made to go to the jury upon the question reserved by the trial court, and defendant having made a motion for a directed verdict, and not having requested to go to the jury upon the question reserved, the trial court might properly decide that question, and his decision can only be reviewed as the decision of a court upon a question of fact and law submitted to him by consent." *Russell v. Crowley*, 147 App. Div. 261, 132 N. Y. Supp. 185, 186. Where the trial court entertained defendant's motion for a nonsuit, both at the close of plaintiff's evidence and at the conclusion of the entire case, reserving decision thereon with the consent of the defendant, and having submitted the case to the jury and having again reserved decision on the motion for a dismissal of the complaint, denied a motion to set aside the verdict for plaintiff and for a new trial but ignored the motions for a nonsuit, on which decision had been reserved, the defendant has no exceptions resulting from his motion to dismiss the complaint and is confined to such exceptions as may be argued under the motion for a new trial. *Smith v. Milliken Bros.*, 200 N. Y. 21, 22, 93 N. E. 184. But it has been held that the practice of reserving decision upon a motion for a non-

suit, and then taking a general verdict from the jury, is not only unauthorized by the Code, but is in some respects unfair, since, if the motion is ultimately granted, and the Appellate Court is of the opinion that it ought not to have been, the defendant is then put in a position where he is deprived of the action of the trial court upon a motion for a new trial on the ground that the verdict is against the weight of evidence, a motion which the justice presiding at the trial is peculiarly fitted to pass upon. *Russell v. Rhinehart*, 137 App. Div. 843, 122 N. Y. Supp. 539 [foll. in *Burns v. New York, etc., Trac. Co.*, 139 App. Div. 145, 123 N. Y. Supp. 474].

2293 n. 679. *Wolverton v. Rogers*, 123 App. Div. 45, 107 N. Y. Supp. 883.

2293 § 1764. "A plaintiff in bringing his action thereby asks to go to the jury on any and every issue of fact which may arise upon the complaint and answer; and the specification by counsel of some issues which occur to him at the moment as especially proper to be submitted, when he perceives that the court is about to direct a verdict against him, does not constitute a waiver of his right to go to the jury upon every other issue of fact which is really in the case." *Pneumatic Signal Co. v. Texas & P. R. Co.*, 200 N. Y. 125, 129, 93 N. E. 471.

2294 n. 682. *Paltey v. Egan*, 200 N. Y. 83, 93 N. E. 267; *Brodsky v. Hynds*, 3 Current Ct. Dec. 93.

2294 n. 683. *Wood v. Rairden*, 111 App. Div. 303, 97 N. Y. Supp. 735 (holding, however, that a statement by a party that he wishes to go to the jury on a specific question, followed by a mere exception, waives the presentation to the jury of any question other than the one stated). But where the motion for a nonsuit was decided after the conclusion of the trial, and was evidenced by an order formally entered at a time when there was no opportunity to take an exception, the Appellate Division will review the judg-

ment as though a formal exception had been interposed. *Sutherland v. St. Lawrence County*, 103 App. Div. 597, 93 N. Y. Supp. 958. Exception is necessary. *Murphy v. Ft. Edward*, 158 App. Div. 342, 143 N. Y. Supp. 378. Where no exception taken, error in excluding a question held waived. *Alexander v. American Encaustic Filing Co.*, 207 N. Y. 276, 100 N. E. 809 [aff. 144 App. Div. 931, 129 N. Y. Supp. 111]. But it has been held that where complaint is dismissed on reserved motion for nonsuit, after disagreement of jury, dismissal is reviewable although not excepted to. *Monaco v. Lange*, 146 App. Div. 18, 130 N. Y. Supp. 581.

**2294** n. 684. There is no use of defendant excepting to the denial of his motion if he intends to put in evidence. *Morgan v. Onward Const. Co.*, 115 N. Y. Supp. 1069. After verdict directed, request to go to jury is too late. *Solomon v. Levine*, 54 Misc. 270, 104 N. Y. Supp. 443. When a request is made to go to the jury upon a question of fact and it is denied and an exception taken, it is unnecessary to go through the idle ceremony of excepting to the direction of a verdict under penalty of being deprived of the exception to the erroneous ruling. *Benedict v. Pincus*, 109 App. Div. 20, 95 N. Y. Supp. 1042. So where the strict application of the rule holding parties to a waiver of the right to go to the jury where they request a directed verdict and thereafter do not ask leave to go to the jury, would work injustice, it may be waived or disregarded by the Appellate Court. *Rosenstein v. Traders' Ins. Co.*, 102 App. Div. 147, 92 N. Y. Supp. 326. Exception to denial of motion for nonsuit raises only a question of law. *Falk v. Havemeyer*, 144 App. Div. 688, 129 N. Y. Supp. 608. Waiver of issue of fact by moving for a directed verdict is recalled by the denial of the motion. *Barber v. Ellingwood*, No. 2, 137 App. Div. 704, 122 N. Y. Supp. 369.

**2295** n. 685. The specific question which the defendant wishes to have submitted to the jury must be called to

the attention of the court by the request. *Keene v. Newark Watch Case Material Co.*, 112 App. Div. 7, 98 N. Y. Supp. 68.

**2295** n. 686. If no request made, court cannot submit the case to the jury. *White v. Kenny*, 69 Misc. 631, 126 N. Y. Supp. 123. The question of fact which is desired to be submitted must be stated. *Bowers v. Ocean Accident & Guarantee Co.*, 110 App. Div. 691, 97 N. Y. Supp. 485.

**2295** n. 689. *Porges v. United States M. & T. Co.*, 203 N. Y. 181, 96 N. E. 424; *Hoffman v. Brooklyn, Q. C. & S. R. Co.*, 78 Misc. 507, 138 N. Y. Supp. 577. Summing up waives ruling. *Hoffman v. Brooklyn, Q. C. & S. R. Co.*, 78 Misc. 507, 138 N. Y. Supp. 577.

**2295** n. 690. *Biogioni v. Eglee Bunting Co.*, 112 App. Div. 338, 98 N. Y. Supp. 591. But where a motion was made after both parties rested, and denied, and thereafter the case reopened and a few unimportant questions asked, it was not necessary to renew the motion after such reopening. *Weizinger v. Erie R. Co.*, 106 App. Div. 411, 94 N. Y. Supp. 869.

**2295** n. 691. *Bopp v. New York Elec. Vehicle Transp. Co.*, is reported in 177 N. Y. 33; *McDowell v. Syracuse Land & Steamboat Co.*, 44 Misc. 627, 90 N. Y. Supp. 148.

**2296** n. 692. *Reshofskey v. Weisz*, 53 Misc. 602, 103 N. Y. Supp. 718.

**2296** n. 694. *White v. Kenny*, 146 App. Div. 803, 131 N. Y. Supp. 416; *Reid v. America Co.*, 136 N. Y. Supp. 75.

**2296** n. 698. See *Cahil v. Gilman*, 84 Misc. 372.

**2297** n. 695. Statute does not authorize reserving decision on motion for nonsuit and then granting it after a "general" verdict for plaintiff. *Russell v. Rhinehart*, 137 App. Div. 843, 122 N. Y. Supp. 539. If, under the evidence, one of two codefendants must be liable, and the jury by their special finding hold neither liable, the court should direct the jury to render a general verdict or direct a verdict for the party



entitled thereto. *Carlin v. New York, N. H. & H. R. Co.*, 135 App. Div. 876, 120 N. Y. Supp. 261. May decide motion after jury fail to agree. *Specht v. Waterbury Co.*, 70 Misc. 404, 127 N. Y. Supp. 137. Where the jury return a verdict for a certain sum in a negligence suit and thereafter the nonsuit is granted for want of evidence, the court cannot thereafter, on defendant's motion to set aside the verdict, review the question of amount of damages and weight of evidence. *Jones v. York Cent. & H. R. R. Co.*, 61 Misc. 139, 114 N. Y. Supp. 756. Where plaintiff claimed that the complaint stated two causes of action, and he was compelled to elect on which he would proceed, and the decision on a motion for a dismissal of the complaint on the ground that the only cause of action in the complaint was the one plaintiff had elected not to try and that the evidence was insufficient to sustain such cause of action, was reserved, and thereafter the jury rendered a verdict for plaintiff, and then the court dismissed the complaint on the ground urged, the dismissal was erroneous. *Zeiser v. Cohn*, 113 App. Div. 9, 98 N. Y. Supp. 1078. An exception must be taken to the reservation of the decision, at the time of the reservation, to raise the question of the power of the court to dismiss after a general verdict. *Antes v. Watkins*, 112 App. Div. 860, 98 N. Y. Supp. 658. The failure to except to the submission to the jury of the specific questions requiring a special verdict, is not cured by an exception to the direction of a general verdict based thereon. *Cooper v. New York, O. & W. R. Co.*, 180 N. Y. 12, 72 N. E. 518. See also ante, **2293** as to reserving decision on motions where no special verdict.

**2297** n. 699. *Russell v. Rhinehart*, 137 App. Div. 843, 122 N. Y. Supp. 539.

**2297** n. 700. A motion by both parties for the direction of a verdict constitutes an election that the trial judge decide any questions of fact in the case. *Rosenstein v. Vogemann*, 102 App. Div. 39, 92 N. Y. Supp. 86. Motion is made in

time if made before verdict is entered. *Strohm v. Zoellner*, 61 Misc. 56, 112 N. Y. Supp. 1063. Defeated party may ask to go to the jury at any time before the directed verdict is actually rendered by the jury. *Maxwell v. Martin*, 130 App. Div. 80, 114 N. Y. Supp. 349. May be made after statement of court that "I will direct a verdict for plaintiffs" but before verdict was recorded. *Brown v. Joy S. S. Co.*, 55 Misc. 201, 105 N. Y. Supp. 81. If defendant does not ask for the submission of any question to the jury, he consents to submission of any question of fact to the court. *Samuel v. Holbrook, C. & R. Co.*, 156 App. Div. 485, 141 N. Y. Supp. 275.

**2298** n. 701. *Seddon v. Tagliabue*, 50 Misc. 156, 98 N. Y. Supp. 236; *Zajic v. Elian*, 50 Misc. 289, 98 N. Y. Supp. 652; *Herrmann v. Koref*, 47 Misc. 94, 93 N. Y. Supp. 488. But see *Brown Paint Co. v. Reinhardt*, 210 N. Y. 162, 104 N. E. 124. Party should be given opportunity to ask to go to the jury. *Peniston v. Coleman*, 141 App. Div. 676, 126 N. Y. Supp. 736. Request by both parties for a directed verdict does not preclude plaintiff, before verdict is rendered, from asking to go to the jury on a specific question. *Zwecker v. Levine*, 135 App. Div. 432, 120 N. Y. Supp. 425. "The judgment must be reversed, however, because the court directed a verdict for the defendant despite the request of the plaintiff to go to the jury upon specific questions of fact, after the defendant had joined with the plaintiff in a motion for the direction of a verdict, the verdict not having actually been rendered by the jury upon the direction before the motion to submit the specific questions was made. The courts, in solicitous recognition of the jury's province as ultimate arbiter of the facts, have too firmly and consistently countenanced this practice to permit an abrogation of the rule, even in a case where it is doubtful if the jury could have reached any other conclusion." *Mann v. Franklin Trust Co.*, 158 App. Div. 491, 143 N. Y. Supp. 660.

**2298** n. 702. *White v. Kenny*, 146 App. Div. 803, 131 N. Y. Supp. 416; *German-American Bank v. Cunningham*, 97 App. Div. 244, 89 N. Y. Supp. 836.

**2299.** If one party asks to go to the jury on a specific question of fact, the case is deemed submitted to the court except as to such specific question. *Creem v. Fidelity, etc., Co.*, 141 App. Div. 493, 126 N. Y. Supp. 555. Where jury has been discharged, after motion for directed verdict by both parties, plaintiff cannot move to go to the jury after denial of his motion. *City of New York v. Thirty-Fourth Street Crosstown Ry. Co.*, 137 App. Div. 644, 122 N. Y. Supp. 344. Motion for submission to jury of entire case may be denied though made in time. *Solomon v. Levine*, 54 Misc. 270, 104 N. Y. Supp. 443. Where each party moved for a direction of a verdict in its favor, but both motions were denied, and disputed questions of fact were submitted to the jury, the court is bound by the verdict to the same extent as a verdict on any issues in an action at law. *New York Produce Exchange Bank v. Twelfth Ward Bank of City of New York*, 52 Misc. 69, 115 N. Y. Supp. 998.

**2299** n. 708. *Maxwell v. Martin*, 130 App. Div. 80, 114 N. Y. Supp. 349; *Bowers v. Ocean Accident & Guarantee Corp.*, 110 App. Div. 691, 97 N. Y. Supp. 485. But where both parties ask for a directed verdict, and after the decision thereon the unsuccessful party asks that the case be sent to the jury without stating any question of fact he desires submitted, and he is not required by the court to state the specific question for the jury, it is error to deny the motion. *Brown Paint Co. v. Reinhardt*, 201 N. Y. 162, 104 N. E. 124 [distinguishing cases in which the only dispute of fact was on some incidental matter not necessary to the decision of the main question in the case] (rev. 148 App. Div. 920).

**2299** n. 709. The request must be specific. *Kinner v. Whipple*, 128 App. Div. 736, 113 N. Y. Supp. 337.

**2300** n. 713. *Hamrah v. N. N. Maloof & Co.*, 127 App. Div. 331, 111 N. Y. Supp. 509. But see ante, **2293** § 1764.

**2300** n. 715. An exception to the direction of a verdict in favor of defendants is not sufficient as an exception to the ruling on the motion for leave to go to the jury. *Kinner v. Whipple*, 128 App. Div. 736, 113 N. Y. Supp. 337. What constitutes saving of exception, see *Maxwell v. Martin*, 130 App. Div. 80, 114 N. Y. Supp. 349.

**2301** § 1765. If defendant does not move for a nonsuit or a dismissal of the action, he cannot on appeal claim that the judgment was wholly without support in the evidence. *Seeman v. Levine*, 205 N. Y. 514, 99 N. E. 158. Failure to move for a dismissal at the close of the whole case is not a waiver of the right to claim that evidence, to the admission of which objection and exception were duly taken, was incompetent and inadmissible. *Bjorkegren v. Kirk*, 53 Misc. 560, 103 N. Y. Supp. 994. As stated in the text the decisions are in conflict as to whether the Appellate Division can review the question whether the evidence was sufficient to take the case to the jury (1) in the absence of a motion to take the case from the jury or (2) in the absence of an exception to the ruling on the motion to take the case from the jury. In the first place, it is submitted that the question whether there is evidence sufficient to make a case for the jury is a question of law, and while exceptions to the rulings on questions of law are not necessary for a review on a motion for a new trial they are necessary, except in cases involving peculiar circumstances, to obtain a review of the ruling on an appeal to the Appellate Division. Accordingly, the rule supported by the weight of authority is that there must not only be a motion to take the case from the jury but also an exception thereto to enable the Appellate Division on appeal to review the question whether there was "any" evidence constituting a cause of action or a defense, as the case may be, which should have been submitted to the jury. This rule is

supported by late case of *Collier v. Collins*, 172 N. Y. 101, 64 N. E. 787; *Perry v. Potsdam*, 106 App. Div. 297, 94 N. Y. Supp. 683; and *Muratore v. Pirk*, 104 App. Div. 133, 93 N. Y. Supp. 484. Of course, a motion to take the case from the jury is not necessary to review of the question whether there is "sufficient," as distinguished from "any," evidence to support the verdict. *Citizens' Bank v. Rung Furniture Co.*, 67 App. Div. 471, 78 N. Y. Supp. 604. It is submitted that the rule that a motion and exception are necessary to authorize a review on appeal to determine whether there is "any" evidence which should have been submitted to the jury, is independent of the question whether a motion for a new trial is made or an appeal taken from the order entered on such motion, since the latter procedure is necessary only where questions of fact are sought to be reviewed.

**2301** n. 718. See *Mieuli v. New York & Q. County R. Co.*, 136 App. Div. 373, 120 N. Y. Supp. 1078. But see *Viele v. Mack Paving & Const. Co.*, 150 App. Div. 839, 135 N. Y. Supp. 147. Where a motion for a nonsuit was not renewed at the close of all the evidence, the Appellate Division cannot grant final judgment for the dismissal of the complaint. *Whitney v. Terry & Tench Co.*, 158 App. Div. 608, 143 N. Y. Supp. 905.

**2301** n. 719. *Miller v. Barnett*, 158 App. Div. 862, 144 N. Y. Supp. 40.

**2302** § 1767. That the fact that a personal injury suit was being defended by a casualty company was brought out in response to an inquiry by the court does not affect its prejudicial character. *Branoner v. Traiter Marble Co.*, 144 App. Div. 569, 129 N. Y. Supp. 761.

**2302** n. 720a. *Frank v. Subin*, 126 N. Y. Supp. 81; *Kleinert v. Federal Brewing Co.*, 107 App. Div. 485, 95 N. Y. Supp. 406 (where the judge accused counsel of deceit and want of diligence in preparing his case). Instruction to disregard was held not to cure the error in *Benoit v. New*

York Cent. & H. R. R. Co., 94 App. Div. 24, 87 N. Y. Supp. 951.

2302 n. 721. *Diamond v. Planet Mills Mfg. Co.*, 97 App. Div. 43, 89 N. Y. Supp. 635. See *Devlin v. New York City R. Co.*, 116 App. Div. 894, 102 N. Y. Supp. 430.

2305 § 1772. The absence of persons who might have been called as witnesses may be commented on. *Brother-ton v. Barber Asphalt Co.*, 117 App. Div. 791, 102 N. Y. Supp. 1089. Persistently, and in defiance of the rulings of the court, commenting on alleged perjury in the answer as to which no proof was offered, is error. *Gesualdi v. Personeni*, 128 N. Y. Supp. 683.

2305 n. 736. *Keenan v. Metropolitan St. R. Co.*, 118 App. Div. 56, 103 N. Y. Supp. 61.

2306 n. 743. Reading opinion in former action in which judge referred to defendant as perjurer is prejudicial. *Greenberg v. Shindel*, 71 Misc. 465, 128 N. Y. Supp. 661.

2307 § 1775. "The books abound with instances where verdicts have been set aside because of improper remarks of counsel, and they abound, likewise, with instances where the courts have refused to disturb verdicts because of such remarks. Therefore, the citation of precedents signifies but little. In the case at bar the trial judge promptly rebuked the counsel for his improper language and in the charge he emphatically and distinctly instructed the jury to disregard the remarks, warning them that the language was intended to excite their prejudice. Generally where the trial court has promptly rebuked counsel and has directed the jury to disregard such remarks the appellate courts have refused to molest the verdict." *Bump v. Delaware, etc., R. Co.*, 157 App. Div. 102, 103, 141 N. Y. Supp. 1009. Stating defendant a very wealthy man held ground for reversal. *Horton v. Terry*, 126 App. Div. 479, 110 N. Y. Supp. 646. But in *Patterson v. Heiss*, 110 N. Y. Supp. 1042, the remark was held cured by withdrawal and instruction.

to disregard. Ground for reversal that plaintiff's attorney brings before jury fact that defendant in negligence suit was protected by insurance. *Hordern v. Salvation Army*, 124 App. Div. 674, 109 N. Y. Supp. 131. Held ground for reversal in a close case where an appeal to prejudice. *Cox v. Continental Ins. Co.*, 119 App. Div. 682, 104 N. Y. Supp. 421. Other statements held ground for reversal, see *Stein v. Brooklyn, Q. C. & S. R. Co.*, 62 Misc. 309, 114 N. Y. Supp. 791; *Freedman v. Press Pub. Co.*, 117 N. Y. Supp. 946. Misconduct held not ground for reversal, see *Kingsley v. Finch, Pruyn & Co.*, 54 Misc. 317, 105 N. Y. Supp. 968; *Bates v. Davis*, 57 Misc. 557, 109 N. Y. Supp. 1094. Statements outside the evidence held cured by subsequent admission of the evidence. *Willets v. Poor*, 155 App. Div. 312, 140 N. Y. Supp. 299.

**2308** n. 751. *Kinne v. International R. Co.*, 100 App. Div. 5, 90 N. Y. Supp. 930; *Fishblatt v. New York City R. Co.*, 51 Misc. 648, 99 N. Y. Supp. 836. See *Loughlin v. Brassil*, 187 N. Y. 128, 79 N. E. 854. Instruction to disregard held to cure ill-timed remarks. *Kuntz v. Howard*, 143 App. Div. 830, 128 N. Y. Supp. 101.

**2308** n. 754. Compare *Long v. Fulton Cont. Co.*, 140 App. Div. 685, 125 N. Y. Supp. 542.

**2310** § 1776. Should not charge to find for plaintiff if the jury believe plaintiff's witnesses, and to find for defendant if they believe defendant's witnesses. *Leventer v. Sheffield Farms-Slawson, etc., Co.*, 132 N. Y. Supp. 777; *Baker v. Brooklyn Union R. Co.*, 146 App. Div. 304, 130 N. Y. Supp. 690.

**2312** n. 764. *Ming v. Corbin* followed in *Stolz v. Syracuse*, 59 Misc. 600, 111 N. Y. Supp. 467.

**2312** n. 765. *Paolino v. Lordi*, 119 N. Y. Supp. 174.

**2317** n. 791. See *Niemann v. Cordtmeyer*, 111 App. Div. 326, 97 N. Y. Supp. 670; *Corrigan v. Funk*, 109 App. Div. 846, 96 N. Y. Supp. 910.

**2320** n. 813. See *Jacobson v. Fraade*, 56 Misc. 631, 107 N. Y. Supp. 706.

**2321.** Error to charge that witness is presumed to be telling the truth until the presumption is overcome by evidence adduced. *People v. O'Brien*, 135 App. Div. 85, 119 N. Y. Supp. 788. Error to charge that jury may reject evidence of expert. *Lubber v. Hilgert*, 135 App. Div. 227, 120 N. Y. Supp. 387. Propriety of charge as to weight of expert evidence, see *Cohen v. Riesenberg*, 69 Misc. 599, 126 N. Y. Supp. 77. Error to charge that public officer stands on a different plane from other witnesses as regards credibility. *People v. O'Brien*, 135 App. Div. 85, 119 N. Y. Supp. 788. It is error to instruct that if the jury believe the testimony of plaintiff, although not corroborated, they "shall" find for plaintiff, being an invasion of the province of the jury. *Cooke v. Union R. Co. of New York City*, 111 N. Y. Supp. 708. Propriety of charge as to effect of attempt to bribe witness and failure to produce witness in regard thereto, see *Ferrari v. Interurban St. R. Co.*, 118 App. Div. 155, 103 N. Y. Supp. 134.

**2324.** The judge may read and comment on the pleadings for the purpose of defining the issue, and showing what part of the allegations are admitted, though the pleadings have not formally been put in evidence. *Foley v. Y. M. C. A.*, 92 N. Y. Supp. 781

**2325** n. 847. Ground for reversal where it cannot be said on what rule of law the verdict was based. *Clarke v. Schmidt*, 210 N. Y. 211, 104 N. E. 613.

**2326** § 1790. Reference to evidence stricken out is error. *Milles v. Perlmutter*, 120 N. Y. Supp. 74. Requested charge as to matters admitted by the reply should be given. *Manhattan Top & Body Co. v. White Co.*, 78 Misc. 401, 138 N. Y. Supp. 314.

**2326** n. 856. *Cepenobwiz v. New York Central, etc., R. Co.*, 147 App. Div. 188, 132 N. Y. Supp. 143.



**2327 § 1792.** It is improper to charge, in an action on a bond of a liquor dealer, that special agents of state excise commissioners "must not in any sense be treated as detectives" and that their testimony is entitled to the same weight as that of other disinterested witnesses. *Cullinan v. Furthman*, 187 N. Y. 160, 79 N. E. 989. It is not proper to instruct that greater weight should be given to the testimony of disinterested witnesses than to that of interested witnesses. *Lawrence v. Metropolitan St. R. Co.*, 114 App. Div. 16, 99 N. Y. Supp. 735. Error to charge that testimony of customers of a party should be carefully scrutinized as that of his friends. *Berkowitz v. Schlanger*, 70 Misc. 239, 126 N. Y. Supp. 664.

**2328.** An instruction that defendant's witnesses, being "sworn officers of the law," are entitled to more credit than plaintiff, is erroneous. *Durst v. Ernst*, 45 Misc. 627, 91 N. Y. Supp. 13. The testimony of a party, not inherently improbable nor contradicted, impeached or discredited, cannot be disregarded by the jury. *Kahl v. New York City R. Co.*, 53 Misc. 566, 103 N. Y. Supp. 872; *Karl v. New York City R. Co.*, 52 Misc. 650, 101 N. Y. Supp. 750; *Meyers v. New York City R. Co.*, 52 Misc. 650, 103 N. Y. Supp. 767.

**2328 n. 866.** See also *Beers v. Metropolitan St. R. Co.*, 88 App. Div. 9, 84 N. Y. Supp. 785.

**2328 n. 868.** *Kapiloff v. Feist*, 91 N. Y. Supp. 27.

**2329 n. 876.** *Lack v. Weber*, 61 Misc. 91, 113 N. Y. Supp. 102.

**2331 § 1794.** A charge that the plaintiff must satisfy the jury by "clear, convincing and conclusive" evidence of the justice of the claim, while technically erroneous, is not necessarily reversible error. *Roberge v. Bonner*, 185 N. Y. 265. It is proper to refuse to charge in a civil case, even where the complaint incidentally alleges the commission of a crime such as an assault, that defendant is presumed inno-

cent until he is proven guilty. *Kurz v. Doerr*, 180 N. Y. 88, 72 N. E. 926. Should not charge that if evidence leaves uncertainty in minds of jury, verdict must be for defendant. *Kaplan v. Lieberman*, 80 Misc. 226, 140 N. Y. Supp. 1010.

**2331** n. 885. To same effect, see *Johnson Service Co. v. MacIernon*, 142 App. Div. 677, 127 N. Y. Supp. 431.

**2331** n. 886. *Belzer v. Daub Storage, etc., Co.*, 130 N. Y. Supp. 153.

**2331** § 1795. Charge as to failure to produce witness, see *Corn v. The B. & M.*, 121 N. Y. Supp. 434. Charge that plaintiff was not bound to call a certain witness held proper. *Paverman v. Joline*, 120 N. Y. Supp. 64. Instruction as to failure to call expert who had testified on former trial, see *Van Wicklen v. Van Wicklen*, 142 App. Div. 507, 127 N. Y. Supp. 75. No presumption from failure to produce witness employed by adverse party. *Remmers v. Berbling*, 66 Misc. 291, 123 N. Y. Supp. 41.

**2331** n. 888. See *Santiago v. Walsh, etc., Co.*, 152 App. Div. 697, 137 N. Y. Supp. 611; *Linsley v. New York City R. Co.*, 54 Misc. 562, 104 N. Y. Supp. 916.

**2332**. Cannot so instruct as to a witness a party was under no obligation to call. *Neale v. Nassau Elec. Ry. Co.*, 161 App. Div. 95. The court should not charge that the jury may consider the fact that defendant produced no witnesses, in the absence of evidence that defendant had any witnesses which it could produce, and where there is no showing that anybody except the witnesses examined by plaintiff can testify upon the subject. *Robinson v. Metropolitan St. R. Co.*, 103 App. Div. 243, 92 N. Y. Supp. 1010. So it is proper to refuse to charge that "if the plaintiff has failed to call a witness who could throw any light on the subject, the jury may infer from their not calling him that he would not help their side." *Baldwin v. Brooklyn Heights R. Co.*, 99 App. Div. 496, 91 N. Y. Supp. 59.

**2332** n. 889. *Hollon v. Brooklyn Heights, etc., R. Co.*,

148 App. Div. 784, 133 N. Y. Supp. 206. See *Richter v. Solomon*, 104 N. Y. Supp. 405. Refusal to charge held not prejudicial. *Geiger v. Rapaport*, 79 Misc. 5, 139 N. Y. Supp. 55.

**2333** § 1796. Should not instruct that jury are exclusive judges of the facts and that their action is not reviewable. *Moore v. Standard Oil Co.*, 155 App. Div. 375, 140 N. Y. Supp. 53.

**2333** n. 897. *Reiss v. Kienle*, 88 N. Y. Supp. 359.

**2333** n. 898. But see *Schmohl v. Buscomi*, 133 App. Div. 20, 117 N. Y. Supp. 788.

**2334** n. 902. *Douglas v. Metropolitan St. R. Co.*, 119 App. Div. 203, 104 N. Y. Supp. 452.

**2334** n. 903. *Burroughs Adding Mach. Co. v. Van Deusen*, 78 Misc. 643, 138 N. Y. Supp. 839. But see *Ball v. Interurban St. R. Co.*, 49 Misc. 129, 96 N. Y. Supp. 739. A defense not submitted to the jury is waived where there is no request to submit it. *Uvalde Asphalt Pav. Co. v. National Trading Co.*, 135 App. Div. 391, 120 N. Y. Supp. 11.

**2335** n. 907. The practice of holding requests to charge until after the charge is condemned in *Fallon v. Mertz*, 110 App. Div. 755, 97 N. Y. Supp. 417. Where the court refuses to receive a verdict because of the inadequacy of the damages awarded in a personal injury suit, and directs the jury to retire and reconsider it because inadequate, it is prejudicial error to refuse to charge that the jury were not bound by the view of the court but that the amount of damages was a question for them. *Douglas v. Metropolitan St. R. Co.*, 119 App. Div. 203, 104 N. Y. Supp. 452. To same effect, see *Paff v. Union R. Co.*, 110 N. Y. Supp. 145.

**2335** n. 916. *Frank v. Metropolitan St. R. Co.*, 91 App. Div. 485, 86 N. Y. Supp. 1018.

**2336** § 1800. Refusal to charge except as already charged is an instruction that the rule requested is not wholly sound. *Pettersen v. Rahtjen's American Composition Co.*, 127

App. Div. 32, 111 N. Y. Supp. 329. Exceptions to a refusal to charge certain requests are waived by the failure to accept the offer of the court to recall the jury and charge the requests refused. *Drucklieb v. Universal Tobacco Co.*, 106 App. Div. 470, 94 N. Y. Supp. 777.

**2336** n. 921. *Coon v. Miller*, 151 App. Div. 631, 136 N. Y. Supp. 226.

**2336** n. 924. To same effect, see *Buckley v. Westchester Lighting Co.*, 93 App. Div. 436, 87 N. Y. Supp. 763.

**2337** n. 928. *Keating v. Mott*, 92 App. Div. 156, 86 N. Y. Supp. 1041; *Buckley v. Westchester Lighting Co.*, 93 App. Div. 436, 87 N. Y. Supp. 763.

**2338** n. 934. *Gressman v. Morning Journal Assoc.*, 197 N. Y. 474, 90 N. E. 1131 [aff. 126 App. Div. 913].

**2338** n. 935. *Dooling v. New York*, 148 App. Div. 713, 132 N. Y. Supp. 1012; *Kenney v. South Shore Natural Gas, etc., Co.*, 134 App. Div. 859, 119 N. Y. Supp. 363.

**2338** n. 936. *Mitchell v. Gillespie Co.*, 152 App. Div. 536, 137 N. Y. Supp. 550.

**2340** n. 948. The judge should not send the court stenographer into the jury room to read to the jury the evidence on a material question. *Otto v. Young*, 43 Misc. 628, 88 N. Y. Supp. 188.

**2341** § 1806. Error in charge, where corrected and injured party then expresses his satisfaction therewith, cannot be taken advantage of by such party. *People v. O'Brien*, 135 App. Div. 85, 119 N. Y. Supp. 788.

**2341** n. 954. *Orendorf v. New York Cent. & H. R. Co.*, 119 App. Div. 638, 104 N. Y. Supp. 222.

**2341** n. 955. *Galino v. Fleischmann Realty & Const. Co.*, 130 App. Div. 605, 115 N. Y. Supp. 334. See *Ladiew v. Sherwood Metal Working Co.*, 125 App. Div. 65, 109 N. Y. Supp. 477.

**2342** n. 960. *Rosenstein v. McCutcheon*, 155 App. Div. 278, 140 N. Y. Supp. 315; *Jacobson v. Ebling Brewing Co.*,

154 App. Div. 787, 139 N. Y. Supp. 319; *Frascone v. Loudersback*, 153 App. Div. 199, 138 N. Y. Supp. 370 [affirmed in 208 N. Y. 631, 102 N. E. 1103]; *Pangburn v. Buick Motor Co.*, 151 App. Div. 756, 137 N. Y. Supp. 37; *Fisher v. Wakefield Park Realty Co.*, 135 App. Div. 808, 120 N. Y. Supp. 129; *Grimm v. Wandell*, 140 N. Y. Supp. 391; *Macdonald v. Macdonald*, 112 App. Div. 330, 98 N. Y. Supp. 581; *Kaplan v. Shapiro*, 53 Misc. 606, 103 N. Y. Supp. 922; *Anderson v. Wood*, 50 Misc. 595, 99 N. Y. Supp. 474. An exception to a ruling on a motion for a nonsuit is sufficient without exception to that portion of the charge which merely elaborates on what was said on the refusal to nonsuit. *Van Allen v. Peabody*, 112 App. Div. 57, 97 N. Y. Supp. 1119. The necessity of an objection may be obviated where the question is raised by objections to evidence and to instructions given in connection with the opening statement to the jury. *Rudomin v. Interurban St. R. Co.*, 111 App. Div. 548, 98 N. Y. Supp. 506. Omission does not eliminate other exceptions. *Smith v. Appleton*, 155 App. Div. 520, 140 N. Y. Supp. 565. But question of law, in a proper case, may be raised by exceptions to denials of motions to dismiss and for a new trial. *Manser v. Astoria Veneer Mills*, 146 App. Div. 478, 131 N. Y. Supp. 729. So questions of law may be reviewed where a new trial was moved for on the ground that the verdict was against the law and the evidence. *Lesin v. Shapiro*, 147 App. Div. 100, 131 N. Y. Supp. 755.

2343 n. 962. *Spencer v. Hardin*, 149 App. Div. 667, 134 N. Y. Supp. 373; *Goldman v. Swartwout*, 117 App. Div. 185, 102 N. Y. Supp. 302. Rule applies where issue improperly submitted. *Caciatore v. Transit Constr. Co.*, 147 App. Div. 676, 132 N. Y. Supp. 572.

2344 n. 967. But where an exception is not taken until the jury has returned ready to render a verdict, it will receive a strict construction. *Twaddell v. Weidler*, 109 App. Div. 444, 96 N. Y. Supp. 90.

**2344** § 1809. General exception to granting requests to charge is insufficient. *Jones v. Gould*, 209 N. Y. 419, 103 N. E. 720 [aff. 152 App. Div. 881, 136 N. Y. Supp. 600].

**2345.** Need not state the reason why the charge is considered erroneous. *Davenport v. Prentice*, 126 App. Div. 451, 110 N. Y. Supp. 1056. Where, at the conclusion of the judge's charge, defendant's counsel presented a number of written requests to charge, it is sufficient to take an exception to those requests which the court refuses to charge without repeating the requests. *Murray v. Narwood*, 192 N. Y. 172, 84 N. E. 958 [reversing on other grounds 119 App. Div. 875, 104 N. Y. Supp. 1135].

**2345** n. 969. *Chinn v. Ferro-Concrete Const. Co.*, 148 App. Div. 368, 132 N. Y. Supp. 850; *Burroughs Adding Mach. Co. v. Van Deusen*, 78 Misc. 643, 138 N. Y. Supp. 839; *Clark v. New York Central & Hudson River R. Co.*, 191 N. Y. 416, 84 N. E. 397 [reversing on other grounds 115 App. Div. 813, 101 N. Y. Supp. 96]; *Lack v. Weber*, 61 Misc. 91, 113 N. Y. Supp. 102.

**2345** n. 970. See *Tucker v. Dudley*, 127 App. Div. 403, 111 N. Y. Supp. 700.

**2345** n. 978. To same effect, *Murdock v. Gould*, 193 N. Y. 369, 86 N. E. 12 [reversing mem. decision in 120 App. Div. 888, 105 N. Y. Supp. 1132].

**2346** § 1810. "The dictum contained in *Lindheim v. Duys*, 11 Misc. 16, 31 N. Y. Supp. 870, that counsel must request the proper complementary instructions is contrary to the rule as declared in *Goldman v. Abrahams*, 9 Daly, 223." The true rule is that a party does not waive exceptions made to erroneous charges by reason of the fact that no request is made by him for a proper one. *Lack v. Weber*, 61 Misc. 91, 113 N. Y. Supp. 102.

**2348** § 1811. Error in charge is not cured by subsequent correct charge unless the latter removes erroneous impres-

sion. *Pratt, Hurst & Co. v. Tailer*, 135 App. Div. 1, 119 N. Y. Supp. 803.

**2349** n. 1001. See *Johnson v. Blaney*, 198 N. Y. 312, 91 N. E. 721.

**2349** n. 1002. *Hurley v. Olcott*, 134 App. Div. 631, 119 N. Y. Supp. 430.

**2349** n. 1003. But see *Johnson v. Blaney*, 198 N. Y. 312, 91 N. E. 721.

**2349** n. 1005. But see *Smith v. Lehigh Valley R. Co.*, 94 App. Div. 125, 87 N. Y. Supp. 1035.

**2350** n. 1010. Otherwise when in evidence. *Raynolds v. Vinier*, 125 App. Div. 18, 109 N. Y. Supp. 293.

**2350** § 1813. That counsel sent ruled out newspaper statement appended to an exhibit which the jury had called for held not ground for new trial where judge instructed to disregard. *Downey v. Finucane*, 146 App. Div. 209, 130 N. Y. Supp. 988.

**2351** § 1815. After jury have retired and they state that they cannot agree, it is prejudicial error to instruct them that they may be punished for contempt for failure to agree and that if the verdict is wrong it can be corrected on appeal. *Levinson v. Zipkin*, 65 Misc. 203, 119 N. Y. Supp. 680.

**2353** n. 1030. See also *McCormick v. Rochester R. Co.*, 133 App. Div. 760, 117 N. Y. Supp. 1110.

**2354** § 1817. If general verdict is supported by the evidence, it is of no consequence that single items in a special verdict are not so supported. *Willeys v. Poor*, 156 App. Div. 312, 140 N. Y. Supp. 229. General verdict against one of several defendants is equivalent to a finding in favor of the other defendants. *Hoffman v. Brooklyn, Q. C. & S. R. Co.*, 78 Misc. 507, 138 N. Y. Supp. 577.

**2355.** The entry of a formal order denying judgment on special findings of a jury is unwarranted. *Civetti v. American Hatters' & Furriers' Corporation*, 124 App. Div. 345, 108 N. Y. Supp. 663.

**2355** n. 1041. Form of special questions, see *Huscher v. New York & Q. E. L. & P. Co.*, 139 N. Y. Supp. 537.

**2356** n. 1047. *Huscher v. New York & Q. E. L. & P. Co.*, 153 App. Div. 422, 143 N. Y. Supp. 639. Applies only where the verdict is a special one. *Pangburn v. Buick Motor Co.*, 151 App. Div. 756, 137 N. Y. Supp. 37.

**2357** n. 1051. After jury have rendered a sealed verdict answering some of the special questions submitted, and they have been allowed to go home, they cannot, on reassembling, be sent back to answer the other questions. *Anderson v. Illinois Surety Co.*, 157 App. Div. 691, 142 N. Y. Supp. 719. Where the jury, after inability to agree on a sealed verdict, are allowed to depart, and on their reassembling in court the next day are discharged on their statement as to failure to agree on the three special questions submitted to them, but immediately thereafter the court, in conversing with the foreman, found that a mistake had been made and that the jury had agreed on two of the questions which obviated the necessity of answering the third, and the court then reassembles the jury and causes them to subscribe their answers as agreed on, the verdict is good. *Rippley v. Frazer*, 69 Misc. 415, 127 N. Y. Supp. 577.

**2357** § 1818. Dicta as to power of another justice of Supreme Court to receive verdict in absence of presiding judge, see *Terriberry v. Mathot*, 110 App. Div. 370, 97 N. Y. Supp. 20.

**2357** n. 1056. While the practice is not regular, it does not make the judgment void. *Dubuc v. Lazell, Dalley & Co.*, 182 N. Y. 482, 75 N. E. 401, reversing 105 App. Div. 533, 94 N. Y. Supp. 1144 [followed in *Terriberry v. Mathot*, 111 App. Div. 235, 97 N. Y. Supp. 21; *Chichester v. Winton Motor Carriage Co.*, 110 App. Div. 78, 96 N. Y. Supp. 1006]. Consent that the clerk receive and enter the verdict does not constitute an estoppel. *Morris v. Harburger*, 100 App. Div. 357, 91 N. Y. Supp. 409. Where it is expressly



agreed on by stipulation, the verdict may be delivered to the officer in charge of the jury and be opened and recorded by the clerk in the absence of the jury as well as the presiding justice. *Chichester v. Winton Motor Carriage Co.*, 110 App. Div. 78, 96 N. Y. Supp. 1006.

**2357** n. 1058. Code provision is now Cons. Laws, c. 30, § 5.

**2359** § 1820. A verdict for plaintiff for the full amount "to be paid by" one of defendants is to be construed as a verdict in favor of the other defendant. *Hoffman v. Brooklyn, Q. C. & S. R. Co.*, 78 Misc. 507, 138 N. Y. Supp. 577. Where one party or the other is entitled to recover a substantial sum, a verdict "for the defendants" is insufficient. *La Rosa v. Wilner*, 51 Misc. 580, 101 N. Y. Supp. 193.

**2361** n. 1091. *O'Reilly v. Erlanger*, 108 App. Div. 318, 95 N. Y. Supp. 760 (verdict in Municipal Court of New York City).

**2362** n. 1094. See *Foy v. Barry*, 159 App. Div. 749, 144 N. Y. Supp. 971.

**2362** § 1821. In an action on a tort where the damages are unliquidated, the court may refuse to receive a verdict, substantial in amount, on the ground of its inadequacy. *Douglas v. Metropolitan St. R. Co.*, 119 App. Div. 203, 104 N. Y. Supp. 452.

**2363.** In tort against two, verdict of \$500 against each may be required to be corrected by making it against defendants jointly for \$1,000. *Hanley v. Brooklyn Heights R. Co.*, 127 App. Div. 355, 111 N. Y. Supp. 575.

**2363** n. 1101. *Salemon v. New York City R. Co.*, 56 Misc. 502, 107 N. Y. Supp. 58.

**2364** n. 1112. Verdict cannot be corrected by increasing it. *Barber v. Ellingwood*, No. 2, 137 App. Div. 704, 122 N. Y. Supp. 369.

**2364** n. 1116. A fortiori the court cannot do so of its own motion on deciding a motion for a new trial on the

ground that the verdict is against the weight of evidence. *Howard v. Bank of Metropolis*, 115 App. Div. 326, 100 N. Y. Supp. 1003.

**2365.** Correction of verdict to conform to actual finding of jury can be made only after notice to the parties. *Band v. Bindseil*, 78 Misc. 161, 137 N. Y. Supp. 890. Clerk, after discharge of jury, cannot change verdict for plaintiffs as recorded by adding words "with interest." *Delafield v. J. K. Armsby Co.*, 124 App. Div. 621, 109 N. Y. Supp. 314.

**2365 n. 1123.** But where the damages were unliquidated and the verdict for plaintiff failed to state any amount, the court cannot insert as damages the entire amount claimed by plaintiff. *Amory v. Washington Steamboat Co.*, 120 App. Div. 818, 105 N. Y. Supp. 999.

**2366.** A verdict for plaintiff against a named defendant cannot be amended some two years later by adding the words "and in favor of" other named defendants, though the application is made to the particular judge who sat at the trial term when the case was heard. *Duerr v. Consolidated Gas Co.*, 104 App. Div. 465, 93 N. Y. Supp. 766.

**2366 n. 1125.** But not where the intent of the jury to allow it is not evident. *Schnauffer v. Ahr*, 53 Misc. 299, 103 N. Y. Supp. 195. Of course if the damages sued for were unliquidated, interest cannot be added. *Bleakley v. Sheridan*, 115 App. Div. 657, 100 N. Y. Supp. 1029.

**2366 n. 1131.** Mistake in entry of verdict may be corrected on affidavits of jurors. *Wirt v. Reid*, 138 App. Div. 760, 123 N. Y. Supp. 706.

**2367 n. 1132.** See also *McAfee v. Dix*, 101 App. Div. 69, 91 N. Y. Supp. 464.

**2367 n. 1137.** *Isbell-Porter Co. v. Braker*, 120 App. Div. 384, 119 App. Div. 891, 105 N. Y. Supp. 1103. The court, at Special Term, on a motion after the term at which the cause was tried, cannot correct the entry of the verdict

by adding interest where no question in regard thereto was raised before the jury was discharged. *Fleming v. Jacob*, 57 Misc. 375, 109 N. Y. Supp. 658 [following *Duerr v. Consolidated Gas Co.*, 104 App. Div. 465, 93 N. Y. Supp. 766, and construing *McAfee v. Dix*, 101 App. Div. 69, 91 N. Y. Supp. 464, as not holding the contrary].

**2368** § 1823. See also ante, **2294** n. 683. But exception to ruling admitting evidence as not within the issues precludes necessity of exceptions to the granting of a motion to amend the complaint in regard thereto. *Electrical Accessories Co. v. Mittenthal*, 146 App. Div. 647, 131 N. Y. Supp. 433. Section 295 of the Judiciary Law requires the official stenographer to take note of every remark or comment of the trial judge, when the trial is by jury and either party requests such note. Section 1323a of the Code of Civil Procedure provides for a review on appeal of every remark or comment of the presiding judge during the trial, duly excepted to. Where there is no exception to the comment, there is therefore no necessity for including it in a proposed case on appeal and it may be struck out as surplusage. *Norwegian, etc., Church v. Krelsovitch*, 147 App. Div. 108, 131 N. Y. Supp. 845. A distinction is to be drawn between appeals to the Appellate Division from the judgment alone and from an order denying a new trial. In the latter case, errors may be reviewed although no exceptions have been taken. *Miller v. Barnett*, 158 App. Div. 862, 144 N. Y. Supp. 40.

**2368** n. 1141. *Burrowes Co. v. Rapid Safety Filter Co.*, 49 Misc. 539, 97 N. Y. Supp. 1048. Rule applied to statement by court to counsel on jury returning to court room for instructions. *Bender v. Bahr Trucking Co.*, 144 App. Div. 742, 129 N. Y. Supp. 737.

**2369** n. 1142. *Byrne v. Gillies Co.*, 144 App. Div. 677, 129 N. Y. Supp. 602. See *Averbuck v. Becher*, 140 N. Y. Supp. 483. May review on appeal from the denial of a mo-

tion for a new trial. *Raible v. Hygienic Ice, etc., Co.*, 134 App. Div. 705, 119 N. Y. Supp. 138.

2369 n. 1146. An exception to the court's refusal to permit a verdict on the theory of a quantum meruit is in time where taken after the jury returned into court with a sealed verdict. *Walar v. Rechnitz*, 126 App. Div. 424, 110 N. Y. Supp. 777.

2370 n. 1151. *Jones v. Gould*, 209 N. Y. 419, 103 N. E. 720 [aff. 152 App. Div. 881, 136 N. Y. Supp. 600].

2370 § 1827. Exceptions to evidence not waived by motion to direct verdict. *Strobel & Wilken Co. v. Wiesen*, 144 App. Div. 149, 128 N. Y. Supp. 798. Exception to ruling admitting book in evidence is not waived by asking that it be shown to the jury. *Zimmerman v. Shapiro*, 55 Misc. 299, 105 N. Y. Supp. 104.

## CHAPTER IV

### TRIAL BY COURT WITHOUT A JURY

2374 n. 7. The statement in the text should be modified by adding that the evidence admitted is ground for reversal where material and affecting the result. See *Rose v. New York & H. R. Co.*, 108 App. Div. 206, 95 N. Y. Supp. 711.

2374 n. 13. *Gottlieb v. Dole*, 109 App. Div. 583, 96 N. Y. Supp. 329. And see *Ewald v. Poates*, 107 App. Div. 242, 94 N. Y. Supp. 1106.

2375. "In trials in equity, or by a court without a jury, a judgment of dismissal, under section 1209 of the Code, would be merely a non-suit. The addition of the words 'upon the merits' is necessary, if so intended." *Strodl v. Farish-Stafford Co.*, 67 Misc. 402, 404, 122 N. Y. Supp. 609.

2375 n. 16. Compare *Morse v. Dayton*, 85 Misc. 12, 147 N. Y. Supp. 68.

2375 n. 17. Where plaintiff's own evidence is the only

evidence given in his behalf, and it is not inherently improbable, the court, where the trial is without a jury, cannot dismiss the complaint when plaintiff rests. *Lewis v. New York City R. Co.*, 50 Misc. 535, 99 N. Y. Supp. 462; *Kappes v. New York City R. Co.*, 50 Misc. 534, 99 N. Y. Supp. 322; *Madden v. New York City R. Co.*, 50 Misc. 555, 99 N. Y. Supp. 320.

**2375** n. 17a. See also *Conover v. Palmer*, 123 App. Div. 817, 108 N. Y. Supp. 480; *Keyes v. Smith*, 183 N. Y. 376, 76 N. E. 473 (holding, also, that the excepting to the findings in the decision was a waiver of the right to insist that the judgment was not upon the merits but was merely a nonsuit).

**2375** n. 17b. *Huking v. Whigam*, 136 App. Div. 675, 121 N. Y. Supp. 424.

**2376** n. 18. *McNulty Bros. v. Offerman*, 141 App. Div. 730, 126 N. Y. Supp. 755.

**2377** n. 26. An oral announcement of the judge's views of the controversy, taken in the stenographer's minutes and transcribed, without being entitled, dated, or signed is insufficient as a decision. *Dobbs v. Brinkerhoff*, 98 App. Div. 258, 90 N. Y. Supp. 480.

**2377** § 1833. See also post, **2613** n. 27. Proposed findings of facts and conclusions of law must be submitted before the case is "finally submitted for decision," i. e., when the testimony is finished and the argument concluded, unless the time is extended by consent. *Hartmann v. Schnugg*, 113 App. Div. 254, 99 N. Y. Supp. 33. A short form decision is improper and ground for reversal. *Wander v. Wander*, 111 App. Div. 189, 97 N. Y. Supp. 586. "It is not an error of law to refuse to find an immaterial fact even upon uncontradicted evidence." *Wallach v. Riverside Bank*, 206 N. Y. 434, 100 N. E. 50.

**2378**. Findings cannot be submitted after the trial judge has handed down his opinion but before he signs his formal

decision, although at the conclusion of the written opinion is the sentence "Findings may be submitted," which is to be construed as merely meaning suggestions. *Dann v. Palmer*, 151 App. Div. 151, 135 N. Y. Supp. 411. A justice at Special Term for Motions cannot direct the Special Term for Trials to pass on requests to find. *Norwegian L. T. Church v. Krelsovitch*, 147 App. Div. 108, 131 N. Y. Supp. 845. If the trial court refuses to pass upon requests to find which have been made seasonably, then an application may be made for a writ of peremptory mandamus to compel the performance of the duty cast upon the trial court by section 1023 of the Code of Civil Procedure, and the hearing on the appeal from the judgment may be stayed until the application for a mandamus is disposed of. *Norwegian, etc., Church v. Krelsovitch*, 147 App. Div. 108, 131 N. Y. Supp. 845.

**2378** n. 30. Oral declaration of court as to its intended disposition of the case as adverse to plaintiff does not preclude a written decision to the contrary. *Bascombe v. Marshall*, 129 App. Div. 518, 113 N. Y. Supp. 993; *Wise v. Cohen*, 113 App. Div. 859, 99 N. Y. Supp. 663. See also post, **2771** n. 145 (vol. 3). Neither the entry in the clerk's minutes nor the opinion of the court can take the place of the formal decision required by the Code. *Electric Boat Co. v. Howey*, 96 App. Div. 410, 89 N. Y. Supp. 210.

**2379**. Two decisions in one case are improper. *Simon v. Burgess*, 146 App. Div. 37, 130 N. Y. Supp. 642.

**2379** n. 31. It is proper for a party to prepare and submit, at the request of the court, and without notice to the opposing party, the findings as signed. The opposing party may then move for a resettlement, but cannot make an ex parte application for additional findings. *Bernheim v. Bloch*, 45 Misc. 581, 91 N. Y. Supp. 40.

**2379** § 1837. Findings not incorporated into the formal decision are nevertheless a part thereof. *Bremer v. Manhattan R. Co.*, 191 N. Y. 333; *Gennert v. Butterick Pub-*

lishing Co., 117 N. Y. Supp. 801. Disposition of requests for findings of fact and conclusions of law need not be incorporated in the decision. *Bremer v. Manhattan R. Co.*, 191 N. Y. 333, 84 N. E. 59 [followed in *Elterman v. Tyman*, 192 N. Y. 113, 84 N. E. 937, rev. on this ground 117 App. Div. 519, 102 N. Y. Supp. 613.] There is no statutory provision requiring that findings by a court or referee include the facts admitted by the pleadings. "The pleadings are a part of the judgment roll, and the admissions therein can always be read in connection with the decision of the court or the report of the referee upon the issues." *Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 158, 76 N. E. 1075. "It is commendable practice for the purpose of preserving a continuity of statement to include in the findings of fact a complete story of the transaction so far as the same is material and can be given from the facts admitted in the pleadings or determined upon the trial of the whole issues of fact, but the statutes do not require findings of fact except upon the issues tried." *Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 158, 76 N. E. 1075. Not sufficient to merely sign proposed findings. Disposition of must be noted thereon. *Edinger v. McAvoy*, 134 App. Div. 869, 119 N. Y. Supp. 327. Judgment not containing findings of fact and law will be reversed. *Mattiaccio v. Illinois Surety Co.*, 139 N. Y. Supp. 280. Requests to find, some marked "found" and some "refused," appended to a paper entitled a decision but in form an order or judgment of the court, is not sufficient as a decision. *Brewster v. Brewster Co.*, 145 App. Div. 812, 130 N. Y. Supp. 654.

2379 n. 36. Entry of judgment on the memorandum or opinion of the trial judge without formal findings is irregular and unauthorized. *Blice v. Goggin*, 157 App. Div. 901, 141 N. Y. Supp. 1109. In court of claims separate findings of facts and conclusions of law must be stated. *Ostrander v. State of New York*, 192 N. Y. 415, 85 N. E. 668 [affirming 126 App. Div. 938, 110 N. Y. Supp. 1139].

**2379** n. 39. Where the trial court, instead of finding either way upon the crucial question of fact in the case, simply found the evidence as given by the witnesses and then drew a conclusion unsupported by any finding of fact, the judgment was reversed. *Dougherty v. Lion Fire Ins. Co.*, 183 N. Y. 302, 76 N. E. 4. Construction of findings of fact as meaning that court had conformed to views of Appellate Division on former appeal, see *Ungrich v. Ungrich*, 141 App. Div. 485, 126 N. Y. Supp. 419.

**2380**. Findings not embodied in the formal decision may be relied on by defendant though inconsistent with a formal finding embraced in the decision. *Hamlin v. Hamlin*, 192 N. Y. 164, 84 N. E. 805 [reversing on other grounds 117 App. Div. 493, 102 N. Y. Supp. 571]. A finding that there is no evidence to sustain a cause of action or a defense is a finding of fact. *Ryan v. Franklin*, 199 N. Y. 347, 92 N. E. 673 [aff. 132 App. Div. 924].

**2380** n. 40. *Barkentheim v. New York*, 77 Misc. 395, 136 N. Y. Supp. 652. Court has no right to make findings on disputed or inconclusive evidence, in case of nonsuit. *McNulty Bros. v. Offerman*, 141 App. Div. 730, 126 N. Y. Supp. 755. If there is no finding, the judgment is considered on appeal as simply one of nonsuit and not on the merits. *Stephenson v. Southerland*, 150 App. Div. 275, 134 N. Y. Supp. 774.

**2380** n. 44. Where a written agreement is not incorporated, in extenso, in the findings, but the substance of the agreement is found with one important exception, the omitted clause cannot be read into the findings. *Ransom v. Cutting*, 188 N. Y. 447, 81 N. E. 324. See also post, **2416** § 1896.

**2380** n. 45. *Loeb v. Suprême Lodge, Royal Arcanum*, 198 N. Y. 180, 91 N. E. 547 [aff. 126 App. Div. 951].

**2380** n. 46. A so-called conclusion of law but in reality a finding of fact in a decision may be treated as a finding of



fact for the purpose of reversal as well as for the purpose of upholding the judgment. *Whalen v. Stuart*, 194 N. Y. 495, 87 N. E. 819.

**2381** n. 59. Findings as inconsistent, see *Villhauer v. Gross*, 138 App. Div. 10, 122 N. Y. Supp. 520.

**2382** n. 63. "Although the findings of fact and conclusions of law are not signed at the end thereof in the usual form, and are not supplemented by a direction for the entry of judgment in accordance therewith, each finding and conclusion is marked found by the court, and upon them judgment has been entered without objection from counsel for the plaintiffs. Since both parties have treated the entry of judgment as regular, we must so regard it for the purposes of this appeal." *Rudiger v. Coleman*, 199 N. Y. 342, 346, 92 N. E. 665 [rev. 129 App. Div. 916].

**2382** nn. 66, 68. Officially reported in 90 App. Div. 553.

**2384** § 1840. After judgment, and the settlement and signature of findings, and the requests to find have been passed on, the court cannot strike out the proposed findings and rulings as to the losing party and substitute others. *Heinitz v. Darmstadt*, 140 App. Div. 252, 125 N. Y. Supp. 109.

**2387** § 1845. It seems that a party who prepares the findings and conclusions of law, by the direction of the trial court, after the announcement of a decision as to the disposition that should be made of the case, is not thereby estopped from taking exceptions to the conclusions. *Frank L. Fisher Co. v. Woods*, 187 N. Y. 90, 79 N. E. 836.

**2388** n. 90. Respondent's exceptions need not be set forth. *Jones v. Bevillard*, 209 N. Y. 446, 103 N. E. 719. Compare ante, **2667** n. 104.

**2388** n. 91. This is so although a motion for a new trial was made on the minutes. *Dearing v. Independent Union Telephone Co.*, 145 App. Div. 152, 129 N. Y. Supp. 13.

**2388** n. 94. *Wilmarth v. Heine*, 137 App. Div. 526, 121 N. Y. Supp. 677.

**2388** § 1847. If no exception is filed to the decision and no exceptions were taken on the trial, there is nothing for an appellate court to review. *Dunleavy v. Dunleavy*, 87 App. Div. 601, 84 N. Y. Supp. 562.

**2390** n. 99. See also *Gilmour v. Colcord*, 183 N. Y. 342, 76 N. E. 273.

**2391** n. 108. *Weeks v. New York, W. & B. R. Co.*, 207 N. Y. 190, 100 N. E. 719.

## CHAPTER V

### REFERENCES

**2551** § 1850. Rule 79 of the General Rules of Practice, as amended in 1913, provides as follows: "All moneys received by a referee appointed to sell real property shall be forthwith deposited by the referee in his own name as referee in a bank or trust company authorized to receive on deposit court funds; and if there be no such depository in the city or town in which the referee resides, then he shall deposit such moneys forthwith in a depository located in an adjoining city or town, or with the County Treasurer of the county in which the action or special proceeding is pending; and such moneys so deposited shall not be withdrawn except as directed by the judgment or order under which the deposit is made, or upon the order of the court."

**2553** n. 2. May consent to a reference of the issues in a partition suit. *Corbett v. Fleming*, 134 App. Div. 544, 119 N. Y. Supp. 543.

**2553** § 1853. Relief from stipulation, see *Williams Engineering, etc., Co. v. New York*, 148 App. Div. 199, 133 N. Y. Supp. 234.

**2554** n. 13. The order may be made and entered nunc pro tunc, after the referee has ordered judgment, in a proper case, as where the order was void because made by a judge

of the Appellate Division. *Owasco Lake Cemetery v. Teller*, 110 App. Div. 450, 96 N. Y. Supp. 985.

**2555** § 1855. Where reference is terminated by failure to file report within sixty days, and a motion to refer the issues again to the same referee is denied by one justice, another justice at Trial Term has no power to refer the issues to such person. *Levin v. Berlin*, Nos. 1 and 2, 141 App. Div. 119, 125 N. Y. Supp. 761.

**2555** n. 18. So where court refuses to confirm report of referee, a new referee should be appointed. *White v. White*, 138 App. Div. 272, 122 N. Y. Supp. 885. New referee held properly appointed. *Buffalo Cold Storage Co. v. Bacon*, 136 App. Div. 263, 120 N. Y. Supp. 960. The resignation of a referee after his appointment and service for a considerable time is a "refusal to serve," within section 1011 of the Code, so as to require the court to appoint another referee. *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 105 App. Div. 88, 95 N. Y. Supp. 849.

**2555** n. 19. *Newman v. Benedict*, 121 N. Y. Supp. 921.

**2556** n. 26. Precludes right to fees. *Hebard v. New York*, 137 App. Div. 752, 122 N. Y. Supp. 628.

**2557** n. 30. *Butterly v. Deering*, 158 App. Div. 181, 142 N. Y. Supp. 1050 [aff. in 210 N. Y. 25 (mem.)].

**2557** § 1860. Where only matter involved is question of set-off involving numerous items of account, the action is referable. *Davidson v. Equitable Life, etc., Soc.*, 118 N. Y. Supp. 490. Action on account stated, not shown to contain items, is not referable. *Lundberg v. De Ronde*, 138 App. Div. 898, 123 N. Y. Supp. 12. Ascertaining number of yards of snow removed, although requiring examination of many witnesses, does not involve examination of long account. *Daly v. New York*, 150 App. Div. 106, 134 N. Y. Supp. 754. "Ordinarily where on the trial of an action at law it is necessary to examine books of account to determine the profits of a business and to ascertain therefrom the amount to which

the plaintiff claims to be entitled, the issues are not referable; but in exceptional cases where it is shown to be impossible for a jury to intelligently determine the issues on account of the accounting by which the amount owing is to be determined, the issues may be referred." *Konheim v. Harris*, 148 App. Div. 238, 240, 132 N. Y. Supp. 1028. In action for breach of contract, parties may waive a jury without the consent of the court, and on the trial the court may order a reference. *Lindner v. Starin*, 60 Misc. 431, 113 N. Y. Supp. 652. In an action at law the court has no power to refer a part of the issues presented by the pleadings, reserving issues to be tried by a jury. *Claffny v. Madison Avenue Co.*, 124 App. Div. 774, 109 N. Y. Supp. 1.

2558 n. 34. Not proper in action for services where no long account involved. *Beves v. Post*, 156 App. Div. 928, 141 N. Y. Supp. 1109.

2558 n. 37. *Daly v. New York*, 150 App. Div. 106, 134 N. Y. Supp. 754; *Smith v. London Assur. Corp.*, 114 App. Div. 868, 100 N. Y. Supp. 194.

2559. "The fact that the account is not directly between the plaintiff and defendant does not affect the referability of the cause." *Davidson v. Equitable Life, etc., Soc.*, 118 N. Y. Supp. 490.

2559 n. 47. Where a balance has been agreed on, there is no account. *Wynkoop v. Wynkoop*, 119 App. Div. 679, 104 N. Y. Supp. 296.

2559 n. 53. *Aronin v. Philadelphia Casualty Co.*, 54 Misc. 630, 104 N. Y. Supp. 810. Need not be directly between plaintiff and defendant, where the state of the account between the parties is the direct subject of inquiry. *Davidson v. Equitable Life, etc., Soc.*, 118 N. Y. Supp. 490.

2560 n. 54. See *Lindner v. Starin*, 128 App. Div. 664, 113 N. Y. Supp. 201.

2560 n. 56. *Smith v. London Assur. Corp.*, 114 App.

Div. 868, 100 N. Y. Supp. 194. See *Levine v. Royal Bank of New York*, 61 Misc. 226, 113 N. Y. Supp. 523.

**2560** n. 58. *Hoff v. Robert H. Reid & Co.*, 110 App. Div. 95, 97 N. Y. Supp. 107 (where defendant stipulated that the services were rendered, except as to two items). See *Northrop v. Butler*, 126 App. Div. 906, 110 N. Y. Supp. 815.

**2561** n. 63. *Bentz v. Carleton & Hovey Co.*, 114 App. Div. 865, 100 N. Y. Supp. 206; *Smith v. London Assur. Corp.*, 114 App. Div. 868, 100 N. Y. Supp. 194.

**2561** n. 64. *Horst Co. v. Stocker*, 134 App. Div. 771, 119 N. Y. Supp. 372. See also *Gibson v. Widman*, 106 App. Div. 388, 94 N. Y. Supp. 593.

**2563** n. 71. See also *Hill v. Reynolds*, 119 App. Div. 689, 104 N. Y. Supp. 303.

**2563** n. 74. *Snell v. Niagara Paper Mills*, 193 N. Y. 433, 86 N. E. 460 [affirming mem. decision in 126 App. Div. 921, 111 N. Y. Supp. 1145]; *Barber v. Ellingwood*, 130 App. Div. 555, 115 N. Y. Supp. 43. Where the answer does not contest the plaintiff's claim but sets up a long account as a counterclaim, a reference is proper. *Kindberg v. Chapman*, 115 App. Div. 154, 100 N. Y. Supp. 686.

**2563** n. 76. See also *Berry v. Maldonado & Co.*, 61 Misc. 442, 113 N. Y. Supp. 800.

**2564** n. 79. *Russell v. McDonald*, 125 App. Div. 844, 110 N. Y. Supp. 950; *Moyer v. Nelliston*, 110 App. Div. 602, 96 N. Y. Supp. 485. When the claim involves services rendered in three causes of action, the court cannot require the defendant to consent that the claims be tried as a whole as a condition of not ordering the reference. *Moyer v. Nelliston*, 110 App. Div. 602, 96 N. Y. Supp. 485.

**2565** nn. 85, 87, 89. *Prentice v. Huff*, 98 App. Div. 111, 90 N. Y. Supp. 780.

**2565** n. 86. See also *Russell v. McDonald*, 125 App. Div. 844, 110 N. Y. Supp. 950.

**2565** n. 92. See also *Lustgarten v. Harlam*, 56 Misc. 606, 107 N. Y. Supp. 612.

**2567** n. 100. *Searle v. Halstead & Co.*, 67 Misc. 560, 124 N. Y. Supp. 811 [rev. on other grounds in 139 App. Div. 134, 123 N. Y. Supp. 811].

**2567** n. 104. See *Russell Hardware, etc., Co. v. Utica Drop Forge & Tool Co.*, 112 App. Div. 703, 98 N. Y. Supp. 777.

**2568** n. 105. *Roome v. Smith*, 123 App. Div. 416, 107 N. Y. Supp. 1088.

**2568** n. 109. *Starr v. Selleck*, 138 App. Div. 277, 122 N. Y. Supp. 1054; *Goodman v. Roth*, 135 App. Div. 515, 120 N. Y. Supp. 328; *Post v. Siclen*, 132 App. Div. 796, 117 N. Y. Supp. 554; *London v. Meryash*, 132 App. Div. 323, 117 N. Y. Supp. 1; *Prince Line v. Seager Co.*, 118 App. Div. 697, 103 N. Y. Supp. 677; *Cayard v. Texas Crude Oil & Min. Co.*, 118 App. Div. 299; *Gibson v. Widman*, 106 App. Div. 388, 94 N. Y. Supp. 593. Where the answer admits the facts which show that an accounting is necessary, plaintiff is entitled to an interlocutory judgment appointing a referee or the court may direct a reference. *Blun v. Mayer*, 113 App. Div. 242, 99 N. Y. Supp. 22. Rule applied in action to foreclose mechanic's lien. *O'Brien v. New York Butchers' Dressed Meat Co.*, 117 N. Y. Supp. 950. An interlocutory judgment in a suit for an accounting is binding on the referee. *Kirkwood v. Smith*, 117 N. Y. Supp. 686.

**2569** § 1862. Reference to advise assignee for benefit of creditors, see *Matter of U. S. Restaurant, etc., Co.*, 140 App. Div. 486, 125 N. Y. Supp. 408.

**2570** n. 116. See *Barnes v. Gardiner*, 140 App. Div. 395, 125 N. Y. Supp. 433.

**2570** n. 117. On motion for writ of assistance. *Neal v. Gilleran*, 123 App. Div. 639, 108 N. Y. Supp. 118. Does not authorize taking of a deposition to be used in opposing a motion to vacate supplemental summons. *John-*

son v. Wellington Copper Mining Co., 58 Misc. 353, 110 N. Y. Supp. 1098. Reference should not be ordered on a motion to set aside the service of summons. Smith v. Western Pacific R. R. Co., 138 App. Div. 244, 122 N. Y. Supp. 888.

**2571.** Reference of matters involved on a motion should not be to hear and determine. Baff v. Elias, 152 App. Div. 226, 136 N. Y. Supp. 563.

**2571 n. 119.** Lindner v. Starin, 128 App. Div. 664, 113 N. Y. Supp. 201; Russell Hardware, etc., Co. v. Utica Drop Forge & Tool Co., 112 App. Div. 703, 98 N. Y. Supp. 777.

**2571 n. 123.** Warren v. Burnham, 125 App. Div. 169, 109 N. Y. Supp. 202. Reference to take proof ordered on motion to compel plaintiff in foreclosure suit to pay the fees and disbursements of referee appointed to sell the premises. Van Boskerck v. Hayward, 81 Misc. 370, 142 N. Y. Supp. 412.

**2572 n. 126.** See Russell Hardware, etc., Co. v. Utica Drop Forge & Tool Co., 112 App. Div. 703, 98 N. Y. Supp. 777.

**2572 § 1863.** It seems that the motion should be based on notice. Blun v. Mayer, 113 App. Div. 242, 99 N. Y. Supp. 22.

**2574 n. 144.** Konheim v. Harris, 148 App. Div. 238, 132 N. Y. Supp. 1028.

**2577 § 1865.** Where order is discretionary, as where long account is involved, it may be conditioned on producing before the referee books and documents relating to the controversy. Searle v. Halstead & Co., 67 Misc. 560, 124 N. Y. Supp. 811. If order granted on the trial on ground that examination of long account is involved, it should specify the papers relied on. Huber Co. v. Rogers, 142 App. Div. 642, 127 N. Y. Supp. 329. An order of reference omitting necessary matters may be amended nunc pro tunc where the referee acted the same as if the omitted matters had been

included. *Ames v. Danzilo*, 158 App. Div. 232, 143 N. Y. Supp. 75.

**2581.** Order may be vacated on motion to vacate the judgment entered on the report. *Randall v. Randall*, 139 App. Div. 674, 124 N. Y. Supp. 524. Vacation of order on appeal makes void the judgment entered on the report. *Newman v. Benedict*, 69 Misc. 630, 125 N. Y. Supp. 1039.

**2582.** Waiver of objection that all parties are not before the court, see *Knickerbocker Inv. Co. v. Voorhees*, 121 App. Div. 690, 106 N. Y. Supp. 455.

**2582 n. 206.** *Blun v. Mayer*, 113 App. Div. 242, 99 N. Y. Supp. 22.

**2583 § 1867.** Laws 1912, cc. 62, 323, as to official referees, amend Laws 1909, c. 35, as amended by Laws 1911, c. 884. Disqualification of referee, because a clerk for defendant's attorney, is waived where there is no objection after knowledge of the facts. *Fleck v. Cohn*, 131 App. Div. 248, 115 N. Y. Supp. 652. In the first judicial district, the Appellate Division is authorized, by Laws 1905, c. 204, p. 422, to appoint certain ex-judges over sixty-five years of age to act as official referees in cases where, for any reason, the expense of the reference should not be borne by the parties. Such referees receive a salary. Laws 1906, c. 186, also provides for the appointment in the first judicial district of the Supreme Court, of retired judges as official referees, to whom any case may be referred by the court where the justice making the order deems for any reason that the expenses of the reference should not be borne by the parties.

**2583 n. 214.** Referee becomes disqualified by assuming office of justice of the Supreme Court. *Matter of Nestel*, 72 Misc. 331, 131 N. Y. Supp. 193.

**2584 n. 217a.** This statute is now amended so as to include clerks in courts of record within both the first and second judicial districts and also an "assistant special deputy clerk," by Laws 1912, c. 154.



**2584** § 1869. May be removed where he solicits advances of fees from both parties. *Topia Mining Co. v. Warfield*, 145 App. Div. 422, 129 N. Y. Supp. 1076. On removal, order may provide that testimony of witnesses then beyond jurisdiction of court may be read in evidence before the new referee. *Tophia Mining Co. v. Warfield*, 145 App. Div. 422, 129 N. Y. Supp. 1076.

**2585.** Official referee is not disqualified to hear charges against an attorney because the referee was a member of the bar association of the city where the attorney practiced. *Matter of Jones*, 159 App. Div. 783, 145 N. Y. Supp. 65.

**2596** n. 306. But see *Gottlieb v. Dole*, 109 App. Div., 583, 96 N. Y. Supp. 329.

**2597** n. 310. See *Butterly v. Deering*, 152 App. Div. 777, 137 N. Y. Supp. 836. Where the effect of the amendment was simply to separately number and state in appropriate counts the several causes of action alleged in gross in the original complaint, and an excision therefrom of extraneous and unnecessary matter, the amendment was within the power of the referee to allow. *People v. Albion Cider & Vinegar Co.*, 118 N. Y. Supp. 15.

**2597** n. 313. *Conway v. Farish-Stafford Co.*, 157 App. Div. 481, 142 N. Y. Supp. 572; *Kelly v. St. Michael's, etc., Church*, 148 App. Div. 767, 133 N. Y. Supp. 328.

**2597** n. 316. Cannot permit an amendment by adding a counterclaim. *Collins v. St. Lawrence Club*, 123 App. Div. 207, 108 N. Y. Supp. 287.

**2597** n. 318. *Perkins v. Storrs*, 114 App. Div. 322, 99 N. Y. Supp. 849.

**2599** n. 338. Referee has power to award costs in his discretion in an equity action. *Osborn v. Cardeza*, 208 N. Y. 131, 101 N. E. 806. Where, on a reference of the whole issues, the referee made no award of costs, and interlocutory judgment was entered thereon, the same referee, on a second order of reference to ascertain damages only,

cannot award those costs which he might previously have given under the original order of reference. *Barnes v. Midland Ry. T. Co.*, 161 App. Div. 621, 146 N. Y. Supp. 1033.

**2599** n. 340. *Taylor v. Taylor*, 63 Misc. 82, 116 N. Y. Supp. 530.

**2600** n. 344. Code provision is now Cons. Laws, c. 30, § 759.

**2606** n. 386. The referee is not bound to take irrelevant testimony unless the reference is merely to take testimony. *Matter of Jones & Co.*, 117 App. Div. 775, 102 N. Y. Supp. 983.

**2607** n. 395. The signature may be waived by failure of either party to insist thereon. *Matter of Hirsch*, 116 App. Div. 367.

**2607** n. 402. See *Barnes v. Midland Ry. T. Co.*, 161 App. Div. 621, 146 N. Y. Supp. 1033.

**2608** § 1885. Necessity for filing and verifying account and waiver, see *Kliger v. Rosenfeld*, 120 App. Div. 396, 105 N. Y. Supp. 214. Referee has no power to pass on question of allowances to administrator, costs and taxable disbursements. *Matter of McGovern*, 118 N. Y. Supp. 378.

**2608** n. 409. May be waived by proceeding with the trial without objection. *Cronk v. Crandall*, 137 App. Div. 440, 121 N. Y. Supp. 805.

**2609** § 1886. See also ante, **2377** § 1833 to **2379** n. 36.

**2610** n. 6. It is improper for the Special Term to permit a party to submit requests to find after the referee has delivered his report and judgment has been entered thereon, where the rights of the party may be fully protected by filing exceptions. *Kinsila v. Shubert*, 160 App. Div. 8, 145 N. Y. Supp. 1129.

**2613**. See post, **2788** n. 228.

**2613** n. 27. *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520.

**2613** n. 28. Failure to mark requests to find held not fatal where disposition of such requests would invalidate

conclusions of law. *Stickles v. Miller*, 143 App. Div. 763, 128 N. Y. Supp. 487.

**2616** n. 423. Mere initials of the referee are not a sufficient signature. *Smith v. Geiger*, 202 N. Y. 306, 95 N. E. 706.

**2616** § 1896. Judgment cannot be entered on a report which fails to indicate what are findings of fact and what are conclusions of law, which is indefinite as to what the decision is, and which contains no direction for entry of judgment. *Anderson v. Knobloch*, 150 App. Div. 834, 135 N. Y. Supp. 251. In action for accounting, referee may either report directing an interlocutory judgment or may retain the action to take and state the account. *Osborn v. Cardeza*, 208 N. Y. 131, 101 N. E. 806.

**2616** n. 425. Since the amendment of 1903, the report "must" state separately the facts found and the conclusions of law. *Lederer v. Lederer*, 108 App. Div. 228, 95 N. Y. Supp. 623; *Moore v. Martine*, 107 N. Y. Supp. 652. A report which does not contain the findings made at the request of a party is insufficient and will be sent back to the referee for correction notwithstanding he filed, on the same day he filed his decision, the requests to find with their allowance or disallowance noted thereon, and the opposing party stipulates that such requests should be included in the judgment roll. *Hudson & M. R. Co. v. Jackson*, 115 App. Div. 168. But the rule now seems to be that the requests and the rulings thereon need not be incorporated into the report. (See ante, **2379** § 1837). Reference in Surrogate's Court held not to hear and determine so that report must contain findings of fact and conclusions of law. *Matter of United States v. Leary*, 138 App. Div. 857, 123 N. Y. Supp. 289.

**2617**. A judgment was reversed in *Cohen v. Wittemann*, 100 App. Div. 338, 91 N. Y. Supp. 493, because findings of fact and conclusions of law inconsistent and irreconcilable.

**2618** n. 441. *People's Trust Co. v. Schenck*, 195 N. Y. 398, 88 N. E. 647.

**2620 § 1897.** Where reference is after judgment to determine amount of plaintiff's damages, referee need not separately state the facts found. *Teale v. Tilyou*, 127 App. Div. 287, 111 N. Y. Supp. 165.

**2622 § 1899.** The report need not state separately the facts found and the conclusions of law as where the reference is of the whole issues of fact. *Matter of Jones & Co.*, 117 App. Div. 775, 102 N. Y. Supp. 983. If referee to compute interest in foreclosure proceedings, computes for a period not within his power to compute for, but within the power of the court, and the court confirms his report, the finding as to interest is the finding of the court. *Weyand v. Park Terrace Co.*, 135 App. Div. 821, 120 N. Y. Supp. 192. On reference to take proof, report determining issues does not invalidate action of court thereon, where court did not treat it as determining the action. *Karon v. Eisen*, 72 Misc. 12, 129 N. Y. Supp. 177. A report of a referee appointed to take proof and report, too broad because assuming to determine the issue submitted to him, is sufficient where the court regards it merely as advisory. *Karon v. Eisen*, 72 Misc. 12, 129 N. Y. Supp. 177.

**2625 § 1901.** That report was allowed to remain in office of referee after the sixty days, is immaterial, where it had been delivered before. *Winckler v. Winckler*, 149 App. Div. 250, 133 N. Y. Supp. 768. Fact that referee made a finding of fact after report was delivered does not show that he had not delivered it. *Winckler v. Winckler*, 149 App. Div. 250, 133 N. Y. Supp. 768. In *Mercantile Nat. Bank v. Sire*, 100 App. Div. 491, 91 N. Y. Supp. 419, where a report was delivered by a referee in ignorance of a stipulation extending the defendant's time to file a brief, the case was sent back to the referee for reconsideration.

**2625 n. 468.** Referee not entitled to fees, and where stenographer consents that his fees be made part of referee's fees, stenographer's fees are forfeited. *Bottome v. Neeley*,

124 App. Div. 600, 109 N. Y. Supp. 120. This Code provision is applicable where the report is not such as the statute requires because of failure to specifically make separate findings of facts and conclusions of law. *Lederer v. Lederer*, 108 App. Div. 228, 95 N. Y. Supp. 623.

**2625** n. 469. The provision does not apply to references in Surrogates' Courts. *Matter of Robinson*, 53 Misc. 171, 104 N. Y. Supp. 588.

**2625** n. 470. *Contra*, see *Matter of Venable*, 111 App. Div. 508, 97 N. Y. Supp. 938.

**2626** n. 480. *Matter of Robinson*, 53 Misc. 171, 104 N. Y. Supp. 588.

**2627** n. 487. *Matter of Robinson*, 53 Misc. 171, 104 N. Y. Supp. 588. The case is not submitted until the submission of the proposed findings of fact and conclusions of law, where they are submitted before the rendition of the report. *Burritt v. Burritt*, 53 Misc. 26, 102 N. Y. Supp. 477.

**2628** n. 496. If reference is terminated because of lapse of time, referee is not entitled to any fees. *Hertzberg v. Elvidge*, 80 Misc. 290, 142 N. Y. Supp. 211.

**2628** § 1902. Can be set aside only for the same reasons and in the same manner as can a decision of the court. *Bedford v. Hol-Tan Co.*, 140 App. Div. 282, 125 N. Y. Supp. 173. Fact that referee was ill, that his hand had to be guided in signing his report, that it was drawn by his business associate under his direction, and that form was prepared by attorney of adverse party, is not ground. *Bedford v. Hol-Tan Co.*, 140 App. Div. 282, 125 N. Y. Supp. 173. Insanity of referee is, it seems, ground. *Bedford v. Hol-Tan Co.*, 140 App. Div. 282, 125 N. Y. Supp. 173. Necessity for case and exceptions, see *Bedford v. Hol-Tan Co.*, 140 App. Div. 282, 125 N. Y. Supp. 173.

**2629** n. 500. *Ward v. Bronson*, 126 App. Div. 508, 110 N. Y. Supp. 335.

**2631.** Acceptance of assignment of the judgment as se-

curity for fees, after notifying plaintiff of a report in his favor, disqualifies the referee from passing on requests to find subsequently submitted. *McCormick v. Walker*, 158 App. Div. 54, 142 N. Y. Supp. 759. Report and judgment should be vacated and set aside, although motion therefor not made until an appeal had been taken, where referee disqualified to pass on requests to find submitted after assignment of judgment to him by plaintiff as security for part of his fees. *McCormick v. Walker*, 158 App. Div. 54, 142 N. Y. Supp. 759.

**2634** n. 538. *People v. Federal Bank of New York*, 122 App. Div. 810, 107 N. Y. Supp. 811. This provision as to exceptions was stricken from the Rules of Practice in 1910, and the last sentence is modified so as to read: "At any time after the report is filed either party may bring on the action or proceeding at Special Term on notice to the parties interested therein."

**2638** § 1904. See *Donnelly v. McArdle*, 152 App. Div. 805, 137 N. Y. Supp. 801.

**2642** § 1905. Where report does not award any costs, report cannot be sent back to pass on costs. *Barnes v. Midland Railroad Terminal Co.*, 144 App. Div. 795, 129 N. Y. Supp. 680. Where report omits to direct the entry of judgment in accordance therewith, the Court of Appeals may reverse and remit the case to the referee for decision. *Smith v. Geiger*, 202 N. Y. 306, 95 N. E. 706.

**2643** n. 603. Not sent back where no requests to find nor exception to the report. *Surpless v. Surpless*, 67 Misc. 586, 124 N. Y. Supp. 809.

**2643** n. 606. *Williams v. Brown*, 73 Misc. 59, 132 N. Y. Supp. 196.

**2647** § 1906. The Code provision does not apply to a special proceeding such as summary proceedings to compel an attorney to pay over moneys. *Matter of Cartier*, 118 App. Div. 342, 103 N. Y. Supp. 505.

**2647** n. 634. Rule applied where issues in partition tried by consent by a referee, and final judgment was entered by consent after interlocutory judgment entered on the report. *Corbett v. Fleming*, 134 App. Div. 544, 119 N. Y. Supp. 543.

**2648** n. 640. *Matter of Venable*, 104 App. Div. 531, 93 N. Y. Supp. 1074.

**2648** n. 650. *Coates v. Nyack*, 127 App. Div. 153, 111 N. Y. Supp. 476.

## PART IX

### CASE AND EXCEPTIONS

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**2653** n. 10. Does not apply to special proceedings. *Sullivan v. McCann*, 124 App. Div. 126, 108 N. Y. Supp. 909.

**2653** n. 11. See *South Bay Co. v. Howey*, 190 N. Y. 240, 83 N. E. 26.

**2655** n. 22. Code provision does not apply where motion is made on judge's minutes and granted but reversed by Appellate Division. *South Bay Co. v. Howey*, 190 N. Y. 240, 83 N. E. 26 [reversing on other grounds 113 App. Div. 382, 98 N. Y. Supp. 909].

**2656** n. 26. *Solomon v. Alexander*, 128 App. Div. 441, 112 N. Y. Supp. 779.

**2656** n. 27. *Hanor v. Housel*, 128 App. Div. 801, 113 N. Y. Supp. 163.

**2656** n. 29. *Rosenthal v. Bell Realty Co.*, 53 Misc. 265, 103 N. Y. Supp. 194.

**2658** n. 40. Extension may be denied because of laches and because no merit in proposed appeal is shown, each of three trials having resulted in a verdict for defendant. *Schueler v. Dooley*, 154 App. Div. 942, 139 N. Y. Supp. 743. Extension not granted where based on false affidavit of absence of official stenographer. *Callan v. Callan*, 154 App. Div. 924, 139 N. Y. Supp. 868.

**2659** n. 43. That the appellant was delayed in making a case by reason of the failure of the stenographer to furnish a copy of the minutes of the trial, and that the preparation



of the case on appeal was further delayed by negotiations between the attorneys for a settlement which were not consummated, is good ground for relieving from default. *Fox v. Fox*, 82 Misc. 394, 143 N. Y. Supp. 714. Opening of default should not be refused because of failure to have the time to file and serve the case extended. *Fox v. Fox*, 82 Misc. 394, 143 N. Y. Supp. 714. Default should not be opened and time extended where there is gross laches. *Muldoon v. Day*, 130 N. Y. Supp. 513. Should apply at Special Term and not before the Appellate Division. In first department, however, practice of granting such motions on conditions in the Appellate Division has been established. *Walker v. Dressler*, 156 App. Div. 718, 141 N. Y. Supp. 1102.

**2661** § 1912. As amended in 1913, Rule 34 of the General Rules of Practice is changed materially as follows: "A case and exceptions shall contain all the evidence by question and answer, the rulings of the court and the exceptions of all parties to the record, but shall not contain the opening and summing up or the remarks of counsel unless ordered by the judge or referee before whom the case or exceptions are settled."

**2661** n. 59. The case, where a verdict was directed for plaintiff, should contain, on defendant's request, the grounds of a motion to dismiss the complaint so that there can be no question as to a waiver by defendant of any position he was entitled to take. *Blewett v. Hoyt*, 117 App. Div. 32, 103 N. Y. Supp. 451.

**2664.** This sentence added to Rule 34 of the General Rules of Practice in 1910 was repealed in 1913: "With the proposed case the appellant may serve his stipulation that he desires to review only the conclusion of the jury, court or referee upon certain specified questions of fact; in which case, the case as settled shall contain all the evidence bearing upon such questions of fact and so much of the evidence as

may be necessary to present the questions of law raised by exceptions taken at the trial; and it shall be the duty of the judge or referee settling the case to strike out all other evidence and to certify that all the evidence relating to the questions of fact which the appellant desires to raise has been included in the case as settled; and upon appeal the Appellate Division shall not review any question of fact not specified in such stipulation." The rule as amended in 1913 now provides that "A case and exceptions shall contain all the evidence by question and answer." *Lis pendens* as evidence necessary to be incorporated, see *Miller v. Norcross*, 122 App. Div. 793, 107 N. Y. Supp. 854.

**2664** n. 82. *German v. Brooklyn Heights R. Co.*, 107 App. Div. 354, 95 N. Y. Supp. 112 [foll. in *Ponch v. Staten Island Midland Ry. Co.*, 142 App. Div. 16, 126 N. Y. Supp. 738]. Not necessary to review exceptions to ruling on motion for a nonsuit or dismissal of the complaint. *Dupont v. Port Chester*, 204 N. Y. 351, 97 N. E. 735.

**2664** n. 86. See *Seliah v. New York Times Co.*, 118 App. Div. 384, 103 N. Y. Supp. 445.

**2665** n. 90. Where findings excepted to on ground that there is no evidence to support the findings of fact, party entitled to amend proposed case on appeal by inserting the evidence. *Savage v. Potter*, 159 App. Div. 729, 145 N. Y. Supp. 78.

**2665** n. 92. *Young v. Barker-Ransom*, 139 App. Div. 194, 123 N. Y. Supp. 743; *Voss v. Smith*, 110 App. Div. 104, 97 N. Y. Supp. 3.

**2666** n. 94. *Moore v. Martine*, 107 N. Y. Supp. 652.

**2666** n. 97. *Dupont v. Village of Port Chester*, 204 N. Y. 351, 97 N. E. 735; *Ceballos v. Munson Steamship Line*, 112 App. Div. 352, 98 N. Y. Supp. 464; *Ianquinto v. Bauer*, 104 App. Div. 56, 58, 93 N. Y. Supp. 388; *Sivin v. Mutual Match Co.*, 46 Misc. 244, 91 N. Y. Supp. 771; *Empire Trust Co. v. Devlin*, 45 Misc. 583, 90 N. Y. Supp. 1066.

**2667** n. 100. See *Cooper v. New York, L. & W. R. Co.*, 122 App. Div. 128, 106 N. Y. Supp. 611.

**2667** n. 102. But where, by inadvertence, the exceptions were omitted from the printed case, or where there is a mutual understanding between court and counsel that a party should be considered as taking the exceptions necessary to present the question of law in the case, such question will be considered. *Hamilton v. Pelonsky*, 48 Misc. 554, 96 N. Y. Supp. 216.

**2667** n. 104. Under the 1912 amendment of section 1317 of the Code, it is necessary to include the respondent's exceptions as well as those of the appellant, so that the Appellate Division may give final judgment without a new trial, thus changing the former rule as laid down in *Matter of Levy*, 91 App. Div. 483, 86 N. Y. Supp. 862. *Bonnette v. Malloy*, 153 App. Div. 73, 138 N. Y. Supp. 67. See also *Wilks v. Greacen*, 155 App. Div. 623, 140 N. Y. Supp. 851. In view of the 1912 amendments to the Code of Civil Procedure and of the construction to be given to them, "it will be necessary to change the practice to some extent and to have the record contain the exceptions of the respondent, to the end that the appellate court may, where it has jurisdiction so to do and where it deems such disposition of the appeal proper, give final judgment without a new trial. The insertion of the respondent's exceptions is neither prohibited by the Code of Civil Procedure nor by the General Rules of Practice, although it is only expressly required that the appellant's exceptions shall be inserted (Code Civ. Proc., § 997; General Rules of Practice, Rules 31, 32); but in view of the limited authority heretofore conferred upon appellate courts, the insertion of the respondent's exceptions in the case has not ordinarily been allowed." *Bonnette v. Molloy*, 153 App. Div. 73, 81, 138 N. Y. Supp. 67. Likewise, Rule 34 of the General Rules of Practice now provides that a case and exceptions shall contain the exceptions of "all" parties to the record.

**2668** n. 111. Remarks and comments of the trial judge not excepted to should not be included. *Norwegian Luther Church v. Krelsovitch*, 147 App. Div. 108, 131 N. Y. Supp. 845. See also ante, **2368** § 1823.

**2668** n. 112. However, it is expressly provided by the 1913 amendment of Rule 34 of the General Rules of Practice that a case shall not contain the opening and summing up or the remarks of counsel unless ordered by the judge or referee settling the case.

**2670** § 1913. Court cannot strike out exceptions duly preserved. *Brauer v. New York City Interborough R. Co.*, 129 App. Div. 384, 113 N. Y. Supp. 705.

**2671** n. 121. Appointment of justice of Supreme Court as ambassador to a foreign country, and his leaving the jurisdiction, makes a case of "disability." *Jermyn v. Searing*, 160 App. Div. 832, 146 N. Y. Supp. 57. A motion by a defendant for an order directing in what manner a case on appeal shall be settled and signed, in case of "disability" of the judge, should not be made until after the service of proposed amendments by the plaintiff. *Jermyn v. Searing*, 160 App. Div. 832, 146 N. Y. Supp. 57. If referee becomes a judge of the Supreme Court he is disqualified. In such a case it must be settled by the surrogate who appointed the referee or by the surrogate's successor in office. *Matter of Nestell*, 72 Misc. 331, 131 N. Y. Supp. 193.

**2671** n. 122. A justice of the City Court of New York City before whom the case was tried has full power to resettle a case although no longer a member of the court. *Knobloch v. Taule*, 53 Misc. 543, 103 N. Y. Supp. 713.

**2671** n. 126. The recollection of the trial judge as to a colloquy between the court and the counsel is conclusive on the appellate court which will not interfere with the record. *Burke v. Baker*, 104 App. Div. 26, 93 N. Y. Supp. 215.

**2672**. "While it is the province of the trial judge to settle the case on appeal, the settlement must be in accordance

with the stenographer's record of the trial, and not in disregard thereof. The provisions of law governing the making of a case on appeal contemplate that the case as settled shall substantially be, though in narrative form, a reproduction of all that is material in the stenographer's minutes, and shall not include anything extraneous to such minutes, unless it appears clearly that such matters are inserted by reason of the fact that the trial justice has independent recollection that they actually occurred on the trial and were improperly omitted from the stenographer's minutes, or it is shown that the stenographic report is inaccurate." *Silverblatt v. Rosenberger*, 134 N. Y. Supp. 579.

**2672** n. 132. But see new rule, ante, **2661** § 1912. Stenographer's minutes, giving question and answer, should not be inserted. *Pulcino v. Long Island R. Co.*, 125 App. Div. 629, 109 N. Y. Supp. 1076.

**2673.** Including remarks of court, speeches of counsel, and showing presence in court of infant plaintiff in a mangled condition, see *Davidson v. New York City R. Co.*, 122 App. Div. 11, 106 N. Y. Supp. 1044.

**2674** n. 148. See also *Baylor v. Levy*, 113 N. Y. Supp. 802.

**2675** n. 153. This rule was repealed by the General Rules of Practice in 1910. A stipulation that the case is a copy of the record filed does not cure the failure to settle and sign. *Sacks v. Hookey*, 55 Misc. 198, 105 N. Y. Supp. 235.

**2676** n. 167. *Sacks v. Hookey*, 55 Misc. 198, 105 N. Y. Supp. 235.

**2679** § 1916. Recollection of trial judge sustained by the stenographer's minutes control assertions in moving affidavits. *Thomas v. American Molasses Co.*, 158 App. Div. 692, 143 N. Y. Supp. 813. Where no good reason therefor is apparent, it is proper to refuse to compel photographic copies of certain checks. *Boskowitz v. Sulzbacher*, 139 App. Div. 899, 123 N. Y. Supp. 508. Where the amendment

necessitates the reprinting of the record, the order should impose the costs of reprinting on the moving party. *Volhard v. Volhard*, 115 App. Div. 548, 101 N. Y. Supp. 453.

**2679** n. 191. In the first department the motion should be made returnable at part one of the Special Term, and if the justice who tried the case is not sitting at said term the presiding justice should refer the motion to him for decision. *Henry v. Interurban St. R. Co.*, 115 App. Div. 352, 100 N. Y. Supp. 811.

**2680.** The minutes of the stenographer are entitled to great weight but are not conclusive as to whether an exception was taken. *People v. Buccufurri*, 154 App. Div. 827, 139 N. Y. Supp. 305.

**2680** n. 199. *People v. Buccufurri*, 154 App. Div. 827, 139 N. Y. Supp. 305. But where Appellate Division grants leave to apply for resettlement so as to have it appear by proper certificate that the case contains all the evidence, parties are entitled as a matter of right to have case so settled. *Trumbley v. N. Y. Central, etc., R. R. Co.*, 138 App. Div. 928, 122 N. Y. Supp. 1071.

**2681.** Colloquy between court and counsel held not subject to motion to strike out. *Moroney v. Cole*, 56 Misc. 454, 107 N. Y. Supp. 214.

**2682** n. 223. *Thomas v. American Molasses Co.*, 158 App. Div. 692, 143 N. Y. Supp. 813. The same rule applies to an order granting a resettlement. *Volhard v. Volhard*, 115 App. Div. 548, 101 N. Y. Supp. 453. The rule that the action of the trial judge in settling a case on appeal cannot be reviewed only applies where it reasonably appears that he decided the disputed matter upon his recollection or understanding of the proceedings before him. *McMahon v. Delaware, L. & W. R. Co.*, 116 App. Div. 532, 101 N. Y. Supp. 805; *Jenkins v. Bishop*, 133 App. Div. 517, 117 N. Y. Supp. 630.



## PART X

### NEW TRIAL

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#### CHAPTER I

##### GENERAL RULES RELATING TO NEW TRIALS

**2685** n. 3. Entry of judgment pending determination of motion does not affect jurisdiction to grant. *Scott v. Town of North Salem*, 138 App. Div. 25, 122 N. Y. Supp. 497.

**2685** n. 7. *People ex rel. Jennings v. Johnson*, 161 App. Div. 625, 146 N. Y. Supp. 977. In the absence of an exception to the dismissal of the complaint at the close of plaintiff's evidence, the propriety of such dismissal cannot be reviewed by the Appellate Division where the appeal is from the judgment only, there being no motion for a new trial. *Muratore v. Pirkel*, 104 App. Div. 133, 93 N. Y. Supp. 484.

**2686** n. 13. The order for a stay does not prevent the entry of judgment but affects only the issuance of execution and proceedings supplementary to the entry. *Stein v. Wabash R. Co.*, 52 Misc. 12, 101 N. Y. Supp. 181.

#### CHAPTER II

##### GROUND FOR NEW TRIAL

**2687** § 1924. A new trial may be granted in furtherance of justice although no statutory ground exists. *Fogel v. Interborough Rapid Transit Co.*, 53 Misc. 32, 103 N. Y. Supp. 977. A new trial, after a nonsuit granted at the close of



plaintiff's case, granted for the purpose of enabling plaintiff to put in additional evidence, may be sustained where plaintiff's evidence presented a question for the jury. *Hirschberg v. Brooklyn, Queens Co., etc., R. R. Co.*, 134 App. Div. 629, 119 N. Y. Supp. 492. Actions to recover real property, as to which one new trial was a matter of course (Code, § 1525) are now governed by the same rules as other actions; that section and parts of following sections being repealed by Laws 1911, c. 509.

**2688.** Cannot change position taken on trial for first time on motion for new trial. *Poppenberg v. Owen & Co.*, 84 Misc. 126, 146 N. Y. Supp. 478. Where complaint dismissed because of mistake of counsel as to a ruling on the trial, a new trial is proper. *Breakstone v. Buffalo Foundry & Mach. Co.*, 79 Misc. 496, 141 N. Y. Supp. 159.

**2688 n. 3.** *Willson v. Faxon, Williams, etc.*, 138 App. Div. 366, 122 N. Y. Supp. 783. Verdict for defendant set aside where plaintiff clearly entitled to nominal damages. *Blass v. Linsley*, 78 Misc. 422, 139 N. Y. Supp. 540.

**2689 § 1925.** Erroneous measure of damages, if agreed on by both sides, is not ground. *Kelly v. Delaney*, 136 App. Div. 604, 121 N. Y. Supp. 241.

**2690 n. 18.** *Blass v. Linsley*, 78 Misc. 422, 139 N. Y. Supp. 540.

**2691.** Error in excluding evidence held ground for new trial. *Gutierrez v. Garcia*, 138 N. Y. Supp. 1079.

**2692 n. 32.** Error not ground where moving party not entitled to recover. *Phelps v. Erie R. Co.*, 134 App. Div. 729, 119 N. Y. Supp. 141.

**2692 § 1926.** Where the trial court is convinced the evidence is wholly insufficient to sustain the verdict, it cannot refuse a new trial on the ground that another jury may award heavier damages. *Rogers v. Macbeth*, 123 App. Div. 571, 108 N. Y. Supp. 74. A trial judge may consider evidence of the immoral character of plaintiff as affecting

her credibility. *Robinson v. Interurban St. R. Co.*, 113 App. Div. 46, 98 N. Y. Supp. 918. "It is well settled that where the evidence is conflicting on material points, and where there is sufficient evidence to justify the finding of the jury, the setting aside of the jury's verdict by the court is an improper exercise of judicial discretion." *Metzler v. Farber*, 131 N. Y. Supp. 655. New trial should be granted where verdict is one that could not have been rendered under any of the evidence. *Fitzpatrick v. Howard*, 148 App. Div. 802, 133 N. Y. Supp. 345. If verdict not merely against the weight of evidence but is unsupported by any evidence, new trial should be granted. *Stumpf v. Cohen*, 78 Misc. 158, 137 N. Y. Supp. 905. If verdict is against the weight of evidence, although the evidence is undisputed, where various inferences may be drawn therefrom, a new trial should be ordered. *Young v. United States, M. & T. Co.*, 131 N. Y. Supp. 33. Where three issues are submitted for a general verdict, the entire verdict is vitiated where it is against the weight of evidence on one of the issues. *Rosenstock v. Metzger*, 136 App. Div. 620, 121 N. Y. Supp. 52. Compromise verdict should be set aside. *Goldberg v. Shapiro*, 140 N. Y. Supp. 1016; *Feinblatt v. Unterberg*, 84 Misc. 459, 146 N. Y. Supp. 188. In an action on an account stated, where the items if correctly added amount to a less sum than that alleged in the complaint, a verdict for the smaller sum should not be set aside on defendant's motion, since he is not prejudiced thereby. *Bove v. Croton Falls Const. Co.*, 81 Misc. 241, 142 N. Y. Supp. 531.

2692 n. 37. See *Zeilian v. James Beggs & Co.*, 153 App. Div. 687, 138 N. Y. Supp. 711.

2692 n. 38. See *Panker v. Whitridge*, 80 Misc. 409, 141 N. Y. Supp. 308; *Siegel v. Kinstler*, 142 N. Y. Supp. 371.

2693. Setting aside verdict as against the weight of evidence though no evidence is introduced for defendant,

see *Surkin v. Interborough St. R. Co.*, 45 Misc. 407, 90 N. Y. Supp. 342.

**2693** n. 40. See also *Walker v. Walker*, 150 App. Div. 280, 134 N. Y. Supp. 689.

**2693** n. 41. *Schwartz v. Joline*, 111 N. Y. Supp. 726; *Lifshitz v. Schwartz*, 107 N. Y. Supp. 579.

**2693** n. 42. *Berkowitz v. Consolidated Gas Co.*, 134 App. Div. 389, 119 N. Y. Supp. 100; *Horn v. Luntz*, 125 N. Y. Supp. 786; *Dambmann v. Metropolitan St. R. Co.*, 55 Misc. 60, 106 N. Y. Supp. 221; *Kingsley v. Finch, Pruyn & Co.*, 54 Misc. 317, 105 N. Y. Supp. 968. See also *Messinger v. Antokolitz*, 74 Misc. 588, 134 N. Y. Supp. 555. If reasonable men might differ as to the result that ought to have been reached by the jury, the verdict should not be set aside. *Von der Born v. Schultz*, 104 App. Div. 94, 93 N. Y. Supp. 547.

**2693** n. 47. See *Kidd v. New York C. & H. R. R. Co.*, 158 App. Div. 904, 142 N. Y. Supp. 1125; *Siegel v. Kinstler*, 142 N. Y. Supp. 371; *Schnitzler v. Oriental Metal Bed Co.*, 93 N. Y. Supp. 1118.

**2694** n. 49. See also *Recktenwald v. Erie R. Co.*, 114 App. Div. 490, 99 N. Y. Supp. 1094.

**2694** n. 50. *Walker v. Newton Falls Paper Co.*, 99 App. Div. 47, 90 N. Y. Supp. 530. Or grant a nonsuit. *Fish v. Utica Steam & Mohawk Valley Cotton Mills*, 109 App. Div. 326, 95 N. Y. Supp. 673.

**2695** n. 58. A second verdict will be set aside where the ends of justice appear to require a new trial. *Lawrence v. Wilson*, 107 App. Div. 365, 95 N. Y. Supp. 147.

**2695** n. 59. *Ridgeley v. Taylor*, 126 App. Div. 303, 110 N. Y. Supp. 665; *Lacs v. James Everard's Breweries*, 107 App. Div. 250, 95 N. Y. Supp. 25; *Perlman v. Brooklyn Heights R. Co.*, 78 Misc. 168, 137 N. Y. Supp. 917; *Merowitz v. Muttosky*, 134 N. Y. Supp. 588. But see *Meinrenken v. New York Cent. & H. R. R. Co.*, 103 App. Div. 319.

**2696** n. 62. See *Salmon v. M. E. Blazier Mfg. Co.*, 123 App. Div. 171, 108 N. Y. Supp. 448.

**2696** n. 63. *Hendrick v. Biggar*, 66 Misc. 576, 122 N. Y. Supp. 162.

**2696** n. 69. See *Feldman v. Levy*, 56 Misc. 563, 106 N. Y. Supp. 1092.

**2697** n. 72. Propriety of refusing on stipulating for reduced recovery, see *Jones v. New York C. & H. R. Co.*, 144 App. Div. 55, 128 N. Y. Supp. 741.

**2697** n. 75. *Gottlieb & Son v. Coutant*, 70 Misc. 380, 127 N. Y. Supp. 250. Compromise verdict of one dollar should be set aside. *Gottlieb & Son v. Coutant*, 70 Misc. 380, 127 N. Y. Supp. 250. The fact that the trial justice may have concluded that the evidence afforded a reasonable doubt as to whether the plaintiff should have had a verdict, or that the nominal verdict rendered was practically and in effect a verdict for defendant, and may have been governed by such conclusion in denying the motion for a new trial, is not sufficient to uphold a verdict which is inadequate. *Fahlbusch v. Brooklyn Heights R. Co.*, 145 App. Div. 544, 546, 129 N. Y. Supp. 877. But verdict should not be set aside as insufficient where uncertainty as to amount of damages is result of plaintiff's evidence. *Smith v. Healey*, 127 N. Y. Supp. 336.

**2697** nn. 79, 80. See *Hogan v. Rosenthal*, 127 App. Div. 312, 111 N. Y. Supp. 676.

**2697** n. 80. *Rockefeller v. Lamora*, 106 App. Div. 345, 94 N. Y. Supp. 549. Contra. A compromise verdict, i. e., where the damages awarded plaintiff are less than he is entitled to if he is entitled to any damages, may be set aside on motion of defendant as well as on motion of plaintiff. *Scheuer v. Manashaw*, 77 Misc. 208, 137 N. Y. Supp. 234.

**2698** § 1927. All questions of fact deemed established in favor of plaintiff. *Famborille v. Atlantic G. & P. Co.*, 155 App. Div. 833, 140 N. Y. Supp. 529.

**2698** n. 81. *Tucker v. O'Brien*, 117 N. Y. Supp. 1010.

**2698** n. 83. *Candee v. Penna. R. R. Co.*, 84 Misc. 506, 147 N. Y. Supp. 529.

**2698** n. 84. *Kaplan v. Shapiro*, 53 Misc. 606, 103 N. Y. Supp. 922.

**2698** n. 85. *Meyers v. Zucker*, 91 N. Y. Supp. 358. Compare *Lawson v. Wells, Fargo & Co.*, 113 N. Y. Supp. 647.

**2698** § 1928. "A trial, in which counsel for one of the parties is held up to ridicule by the court for making proper objections and is unjustifiably threatened with punishment by fine and imprisonment and is denied a hearing upon relevant matters, is not a fair trial. An advocate subjected to such persistent discourtesy from the court is embarrassed in the presentation of the cause of his client, and the cause of the client is palpably prejudiced in the eyes of the jury." A new trial is proper. *Bennett v. Harris*, 68 Misc. 503, 507, 124 N. Y. Supp. 797.

**2699.** The trial justice, where he has sustained all the objections made to the conduct of counsel in reiterating to the jury the contents of vital documents not received in evidence and has instructed the jury that they should pay no heed to such statements by counsel, is not bound to assume that his efforts to eradicate the effects of such misconduct were effectual, but may nevertheless set aside the resultant verdict, if convinced beyond a doubt that the misapprehensions created by the conduct of counsel remained a decisive factor in the jury's deliberations. *Hoffman v. New York Railways Co.*, 84 Misc. 637, 147 N. Y. Supp. 900. Improper remarks of counsel are not ground for new trial where no request of opposing party in regard thereto is made. *Heywood v. Doherty*, 129 N. Y. Supp. 507. Misconduct of counsel in conspiring with witness to give false testimony held not shown. *Hammond v. Delaware, L. & W. R. Co.*, 140 App. Div. 810, 126 N. Y. Supp. 141. Improper influence of juror by counsel and witness, where both blameless, held not ground. *Jones v. L'Ecluse*,

134 App. Div. 928, 118 N. Y. Supp. 1116. Act of attorney for successful party in twice treating the jurors to cigars during the trial is ground for a new trial. *Steenburgh v. McRorie*, 60 Misc. 510, 113 N. Y. Supp. 1118. Misconduct of attorney in summing up in referring to amount of damages given for injured shoulder in trial the day before held ground. *Nelson v. Forty-second St., M. & St. N. Ave. R. Co.*, 55 Misc. 373, 106 N. Y. Supp. 552. Misconduct of party in overpaying jurors each day to their knowledge is ground for new trial, it seems. *In re Vanderbilt*, 127 App. Div. 408, 111 N. Y. Supp. 558.

2699 n. 92. See also ante, 2530 § 1813.

2699 n. 93. Asking question of defendant, in suit for personal injuries, as to insurance protection, see *Tincknell v. Ketchman*, 78 Misc. 419, 139 N. Y. Supp. 620.

2700 n. 102. See also ante, 2350 § 1813.

2701. Statements of juror in jury room as to personal inspection, as ground, see *Messinger v. Autokolitz*, 74 Misc. 588, 134 N. Y. Supp. 555.

2701 n. 105. "The mere fact that an attorney may have exchanged words with a trial juror is not enough to vitiate a subsequent verdict. If there is the slightest doubt or the slightest question as to the innocence of the transaction, no verdict can stand. But, where there is none, it would be carrying to an extreme rules made for the protection of the jury to hold that, under such circumstances, any verdict must be set aside." *Ripley v. Frazer*, 69 Misc. 415, 419, 127 N. Y. Supp. 577.

2701 n. 106. See also *Bernikow v. Pommerantz*, 94 N. Y. Supp. 487.

2701 n. 107. *Johnson v. Riter-Conley Mfg. Co.*, 149 App. Div. 543, 133 N. Y. Supp. 1004.

2702 n. 114a. On the other hand it is not a ground for a new trial that one of the jurors visited the scene of the accident pending the trial and reported to the jurors the results

of his observation where their affidavits show that they were not influenced thereby. *Dittman v. New York*, 58 Misc. 52, 110 N. Y. Supp. 40. That jurors visited place unattended and of their own motion is ground. *Adams Laundry, etc., Co. v. Prunier*, 74 Misc. 529, 134 N. Y. Supp. 475.

**2702** n. 115. Compare *Jefson v. Crosstown St. R. Co.*, 72 Misc. 103, 129 N. Y. Supp. 233. If juror is inadvertently not asked an important question, his failure to disclose answer is ground. *Bacelli v. Booth*, 75 Misc. 260, 133 N. Y. Supp. 343.

**2702** nn. 116-118. That a juror disclosed the verdict on the way from the jury room to the court room cannot be taken advantage of after the rendition of the verdict, when the objecting party knew of it before the verdict was rendered. *Bernikow v. Pommerantz*, 94 N. Y. Supp. 487.

**2703** § 1930. Credibility of new witness should not be determined. *Laird v. Ahl*, 140 App. Div. 659, 125 N. Y. Supp. 527. Conditions developing since the trial does not constitute newly discovered evidence. *Fogel v. Interborough Rapid Transit Co.*, 53 Misc. 32, 103 N. Y. Supp. 977. Evidence is not newly discovered merely because the party has newly discovered that it might be desirable to produce it. *Boyd v. Boyd*, 130 App. Div. 161, 114 N. Y. Supp. 361. A new trial will not be granted because a party who was sworn as a witness in his own behalf omitted to testify to something which, after an adverse decision, has been brought to his mind by a recollection refreshed, especially where the alleged admission was made, if made at all, to a man who had been employed by the plaintiff, and who afterwards was employed and sworn as an expert for the defendant. Under such circumstances, the admission would be looked upon with great suspicion, and it could hardly be claimed that the evidence was of such a character or came from such a source that there would be a reasonable certainty of its changing the result on another trial. *Brown v. Newell*,

132 App. Div. 548, 116 N. Y. Supp. 965. As ground in particular case, see *King v. Caruba*, 120 N. Y. Supp. 107.

**2703** n. 121. Prejudice not necessary. *Ballard v. Van Tuyl*, 142 App. Div. 278, 126 N. Y. Supp. 820.

**2703** n. 125. *James McCreery Realty Corp. v. Equitable Nat. Bank*, 123 App. Div. 358, 107 N. Y. Supp. 1080. Strict rules not applied where wife found guilty of adultery. *Abrams v. Abrams*, 156 App. Div. 931, 141 N. Y. Supp. 723.

**2703** n. 126. Letters, see *Raymond v. Ring*, 60 Misc. 235, 112 N. Y. Supp. 1.

**2704** n. 131. See also *Popadinec v. Manhattan R. Co.*, 109 App. Div. 850, 96 N. Y. Supp. 913; *Froment v. Mugler*, 51 Misc. 68, 99 N. Y. Supp. 877; *Kantrovitz v. Silverman*, 50 Misc. 608, 99 N. Y. Supp. 528. See *Henson v. Lehigh Valley R. Co.*, 117 N. Y. Supp. 119; *Bankers' Money Order Ass'n v. Nachod*, 128 App. Div. 307, 112 N. Y. Supp. 740; *Chaet v. Goldberg*, 110 N. Y. Supp. 817.

**2704** n. 132. *Neidlinger v. Onward Const. Co.*, 124 App. Div. 26, 109 N. Y. Supp. 717.

**2705** n. 139. *Brooklyn, Q. C. & S. R. Co. v. Bird*, 78 Misc. 683, 138 N. Y. Supp. 826 [aff. in 156 App. Div. 887, 141 N. Y. Supp. 1111]; *Schwartz v. Copeland*, 136 N. Y. Supp. 41; *Heintze v. Graham*, 116 N. Y. Supp. 548; *Casari v. Wogelsong*, 114 N. Y. Supp. 882; *Reilly v. Hazeltine*, 127 App. Div. 64, 111 N. Y. Supp. 457; *Seligman v. Sivin*, 46 Misc. 58, 91 N. Y. Supp. 395. See *Richardson v. Tanner*, 140 App. Div. 372, 125 N. Y. Supp. 345. Especially should such rule be rigidly enforced where five trials have been had and the witnesses were readily accessible. *Hagen v. New York Cent. & H. R. R. Co.*, 100 App. Div. 218, 91 N. Y. Supp. 914 [reversing 44 Misc. 540, 90 N. Y. Supp. 125]. But the fact that the evidence is not discovered until after a third trial is not necessarily fatal. *Beers v. West Side R. Co.*, 101 App. Div. 308, 312, 91 N. Y. Supp. 957. Need not



anticipate manufactured testimony. *Flock v. Kaufman*, 107 N. Y. Supp. 752.

**2706** n. 145. *Laird v. Ahl*, 140 App. Div. 659, 125 N. Y. Supp. 527; *Solomon v. Alexander*, 128 App. Div. 441, 112 N. Y. Supp. 779. New trial proper where new evidence is as to plaintiff's condition, in action for personal injuries, where verdict is excessive. *Ballard v. Hamburg*, 143 App. Div. 719, 128 N. Y. Supp. 325.

**2706** n. 147. *Sachs v. Gasdorf*, 84 Misc. 457, 146 N. Y. Supp. 186; *Williams v. Joline*, 126 N. Y. Supp. 417, 2 Civ. Pro. Rep. (N. S.) 188.

**2707** n. 156. *James McCreery Realty Corporation v. Equitable Nat. Bank*, 54 Misc. 508, 104 N. Y. Supp. 959.

**2707** n. 157. Where the verdict rests on plaintiff's unsupported and contradictory evidence, which was met at every point by witnesses most of whom were disinterested, a new trial should be granted to defendant though the newly-discovered evidence is merely cumulative. *Schnitzler v. Oriental Metal Bed Co.*, 93 N. Y. Supp. 1119.

**2707** n. 158. *Schnitzler v. Oriental Metal Bed Co.*, 47 Misc. 356, 93 N. Y. Supp. 1119.

**2707** n. 160. *Hueser v. New York Trans. Co.*, 143 App. Div. 494, 128 N. Y. Supp. 415; *Bove v. Croton Falls Constr. Co.*, 82 Misc. 202, 143 N. Y. Supp. 1004; *Brooklyn, Q. C. & S. R. Co. v. Bird*, 78 Misc. 683, 138 N. Y. Supp. 826 [affirmed in 156 App. Div. 887, 141 N. Y. Supp. 1111]; *Brennan v. Joline*, 125 N. Y. Supp. 525, 2 Civ. Pro. Rep. (N. S.) 245; *Riley v. United States Title Guaranty & Indemnity Co.*, 117 N. Y. Supp. 974; *Neidlinger v. Onward Const. Co.*, 124 App. Div. 26, 109 N. Y. Supp. 717; *Flock v. Kaufman*, 107 N. Y. Supp. 752; *Romaine v. Spring Valley*, 120 App. Div. 501, 105 N. Y. Supp. 256. See *Lynch v. McCabe*, 126 App. Div. 744, 111 N. Y. Supp. 291.

**2708.** Reputation and character of proposed new witnesses, and fact that they denied any knowledge before the

trial, may be considered. *Heuser v. New York Trans. Co.*, 143 App. Div. 494, 128 N. Y. Supp. 415. False testimony of plaintiff held ground. *Hansen v. Vogelsang*, 139 App. Div. 759, 124 N. Y. Supp. 437, 438. Affidavit of plaintiff's only witness, contradicting his testimony, although afterwards denied, is ground. *Shanahan v. Feltman*, 154 App. Div. 809, 139 N. Y. Supp. 409. False testimony of material witnesses that they were not related to plaintiff, discovered by defendant after verdict, is ground. *Bernstein v. Schneider*, 72 Misc. 479, 131 N. Y. Supp. 340. Where the verdict for plaintiff is based on the evidence of one witness, and there is a strong showing that he committed perjury, a new trial should be ordered. *Chapman v. Delaware, L. & W. R. Co.*, 102 App. Div. 176, 92 N. Y. Supp. 304.

2708 n. 163. *Miller v. Breitenbecker*, 140 N. Y. Supp. 293.

2708 n. 165. *Phillips v. Schlang*, 139 App. Div. 930, 124 N. Y. Supp. 40 [rev. 67 Misc. 142, 121 N. Y. Supp. 913].

2708 n. 166. "Motions for new trials upon the ground of newly-discovered evidence are not to be lightly granted. The fact that subsequent statements of witnesses are at variance with their evidence given upon the trial is not alone sufficient. Each case must be considered upon its own facts and a strong case must be made out leading to the conclusion that justice requires a new trial. Such case is made, we think, when a party to an action swears positively to a material fact which is conclusive and subsequently in a court proceeding swears as positively to the contrary." *Kalashen v. Till*, 136 App. Div. 632, 636, 121 N. Y. Supp. 393.

2708 n. 167. The *Chapman* case is officially reported in 102 App. Div. 176. But see *Perry v. Hudson & M. R. Co.*, 77 Misc. 646, 138 N. Y. Supp. 547.

2708 n. 168. But where the most material witness for plaintiff on the subject of damages makes an affidavit, that her testimony was false, and her statements in her affidavit

are corroborated by other affidavits, a new trial should be granted. *O'Hara v. Brooklyn Heights R. Co.*, 102 App. Div. 398, 92 N. Y. Supp. 777.

**2709** n. 174. But see *Fogel v. Interborough Rapid Transit Co.*, 53 Misc. 32, 103 N. Y. Supp. 977.

**2710**. Surprise as to the decision is not ground for a new trial. *McWhirler v. Bowen*, 103 App. Div. 447, 92 N. Y. Supp. 1039. Surprise at the application of the law to the undisputed facts is no ground. *Hapgoods v. Lusch*, 123 App. Div. 27, 107 N. Y. Supp. 334. That surprise is not ground seems to be stated in *Schwartz v. Copeland*, 136 N. Y. Supp. 41.

**2711** nn. 189, 190. *Carlisle v. Barnes* is affirmed in 102 App. Div. 582, 92 N. Y. Supp. 924.

**2711** n. 191. But this rule does not apply where manufactured evidence is introduced. *Seligman v. Sivin*, 46 Misc. 58, 91 N. Y. Supp. 395.

**2712** n. 200. See also *Ellis v. Hearn*, 132 App. Div. 207, 116 N. Y. Supp. 977.

**2714** n. 212. *Roenbeck v. Brooklyn Heights R. Co.*, 123 App. Div. 606, 108 N. Y. Supp. 80; *Hapgoods v. Lusch*, 123 App. Div. 27, 107 N. Y. Supp. 334. *Harvey v. Fargo* is officially reported in 99 App. Div. 599. Compare *Seligman v. Sivin*, 46 Misc. 58, 91 N. Y. Supp. 395 (where rule was held not to apply).

**2715** n. 217. New trial not a matter of right where case has never been submitted by both sides. *Sobel v. Counes*, 69 Misc. 422, 125 N. Y. Supp. 893.

## CHAPTER III

## PROCEDURE TO OBTAIN NEW TRIAL

**2718** n. 5. *Polo v. D'Achille*, 157 App. Div. 294, 142 N. Y. Supp. 506; *Ellis v. Hearn*, 132 App. Div. 207; *Rayne v. O'Connor*, 84 Misc. 41, 145 N. Y. Supp. 980; *Wilcox v. Fox*, 112 App. Div. 560, 98 N. Y. Supp. 769. Where a motion made during the term was denied, a new trial cannot be granted after the term on reargument. *Ellis v. Hearn*, 132 App. Div. 207, 116 N. Y. Supp. 977. Motion cannot be granted on reargument after such term. *Rayne v. O'Connor*, 84 Misc. 41.

**2718** § 1938. If based on exceptions, they must have been taken before the verdict. *Polo v. D'Achille*, 157 App. Div. 294, 142 N. Y. Supp. 506.

**2719** n. 11. Verdict against evidence is not ground. *Wagner v. Herrmann Lumber Co.*, 121 N. Y. Supp. 607.

**2720** § 1942. If motion is based on exceptions, it can only be made on such exceptions as were taken before the jury rendered its verdict. *Polo v. D'Achille*, 157 App. Div. 294, 142 N. Y. Supp. 206.

**2720** n. 25. But see *Grimm v. Wandell*, 140 N. Y. Supp. 391.

**2721** n. 26. *Reiss v. Joline*, 69 Misc. 349, 125 N. Y. Supp. 765.

**2721** § 1943. After motion for new trial on the minutes has been denied by the trial judge, the exceptions cannot be ordered to be heard in the first instance at the Appellate Division. *Babad v. Colton Dental Ass'n*, 150 App. Div. 561, 135 N. Y. Supp. 555.

**2727** n. 68. *Fox v. Fox*, 128 App. Div. 876, 113 N. Y. Supp. 121 [citing 3 *Nichols' New York Pr.* 2727].

**2727** n. 70. *Koch v. Cohen*, 113 N. Y. Supp. 1035.

**2727** n. 72. *Rayne v. O'Connor*, 84 Misc. 41. Waiver,

see *Ellis v. Hearn*, 132 App. Div. 207, 116 N. Y. Supp. 977.

**2729** § 1946. The New York City Court may grant a new trial for newly-discovered evidence pending a writ of error from the Supreme Court of the United States. *James McCreery Realty Corporation v. Equitable Nat. Bank*, 54 Misc. 508, 104 N. Y. Supp. 959. See also post, **2731** n. 95.

**2729** n. 80. So held where motion was based on surprise, mistake, etc. *McWhirter v. Bowen*, 103 App. Div. 447, 92 N. Y. Supp. 1039.

**2730** n. 88. Nor is a motion on the ground that the verdict is in violation of the instructions of the court within the time limit. *Brown v. Grossman*, 59 Misc. 153, 110 N. Y. Supp. 262.

**2731** n. 95. So the motion is not barred by a removal of the judgment by writ of error to the United States Supreme Court and its affirmance by that court. *James McCreery Realty Corp. v. Equitable Nat. Bank*, 123 App. Div. 358, 107 N. Y. Supp. 1080 [affirming 54 Misc. 508, 104 N. Y. Supp. 959 which affirmed 52 Misc. 300, 102 N. Y. Supp. 975.]

**2731** n. 96. *Buffalo Cold Storage Co. v. Bacon*, 136 App. Div. 263, 120 N. Y. Supp. 960; *Cerrato v. Santugge*, 119 N. Y. Supp. 615. Pendency of appeal does not bar motion. *James McCreery Realty Corporation v. Equitable Nat. Bank*, 54 Misc. 508, 104 N. Y. Supp. 959.

**2731** n. 101. *Rayne v. O'Connor*, 84 Misc. 41 (where ground newly-discovered evidence).

**2732** n. 108. If new witness refuses to make affidavit, motion may nevertheless be granted. *Cerrato v. Santugge*, 119 N. Y. Supp. 615. It is enough if it is shown that such affidavit cannot be obtained. *James McCreery Realty Corporation v. Equitable Nat. Bank*, 54 Misc. 508, 104 N. Y. Supp. 959.

**2733** n. 111. Insufficient showing as to ignorance and diligence. *Matter of Rose*, 153 App. Div. 263, 137 N. Y. Supp. 1079.

**2733** n. 112. *Matter of Rose*, 153 App. Div. 263, 137 N. Y. Supp. 1079.

**2733** n. 116. *Hagen v. New York Cent. & H. R. R. Co.*, 44 Misc. 540, 90 N. Y. Supp. 125, is reversed in 100 App. Div. 218, 91 N. Y. Supp. 914, where it is said that while the credibility of witnesses is for the jury, yet the reputation and character of the newly-discovered witness should not be disregarded in determining the motion. And a later case holds that the character of the proposed witnesses may be taken into account as one of the things to be considered. *James McCreery Realty Corporation v. Equitable Nat. Bank*, 54 Misc. 508, 104 N. Y. Supp. 959.

**2733** n. 117. Nor where his counter affidavit shows that he would not testify as claimed. *Bishop v. Kingston Gas, etc., Co.*, 131 N. Y. Supp. 1039.

**2734** n. 123. *Dittman v. New York*, 58 Misc. 52, 110 N. Y. Supp. 40.

**2734** n. 125. *Zint v. Mulligan*, 140 App. Div. 230, 124 N. Y. Supp. 1016; *Hanor v. Housel*, 128 App. Div. 801, 113 N. Y. Supp. 163; *Messinger v. Antokolitz*, 74 Misc. 588, 134 N. Y. Supp. 555; *Jefson v. Crosstown St. R. Co.*, 72 Misc. 103, 129 N. Y. Supp. 233.

**2734** n. 127. *Broadway Bldg. Co. v. Saladino*, 81 Misc. 73, 142 N. Y. Supp. 1076. Affidavit of third person on information received from one of the jurors held insufficient to show misconduct. *Gregory v. Bijou Theatre Co.*, 138 App. Div. 590, 122 N. Y. Supp. 1085.

**2738** n. 158. See also *Jackson v. Stephens*, 83 Misc. 833.

**2740** n. 164. But where a general verdict is rendered against joint tort-feasors, a new trial for error in an instruction as to one must apply to both. *Bamberg v. International R. Co.*, 121 App. Div. 1, 105 N. Y. Supp. 621.

**2740** n. 165. But see *Colwell Lead Co. v. Construction Material & Coal Co.*, 156 App. Div. 824, 142 N. Y. Supp. 112.

**2740** n. 166. *Drescher Rothberg Co. v. Landeker*, 140 N. Y. Supp. 1025. If there was any evidence to present to the jury, complaint should not be dismissed where verdict set aside as against weight of evidence. *Smith v. Stork*, 126 App. Div. 355, 110 N. Y. Supp. 749.

**2741** n. 171. See also post, **3868** n. 131. *Solomon v. Alexander*, 128 App. Div. 441, 112 N. Y. Supp. 779. But such omission does not necessarily require a reversal. *Israel v. Ury*, 52 Misc. 525, 102 N. Y. Supp. 871. It is not sufficient to merely state the grounds of the motion. *Israel v. Ury*, 52 Misc. 523, 102 N. Y. Supp. 873. Order not stating grounds should be resettled. *Clarke v. Acme Bldg. Co.*, 143 App. Div. 269, 128 N. Y. Supp. 88.

**2742** § 1957. Terms should be imposed where ground is newly-discovered evidence. *Macaulay v. Anthony*, 127 N. Y. Supp. 420. Payment of taxable costs to time of motion held proper where motion granted on ground of newly-discovered evidence. *Walmsley v. Phillips*, 119 N. Y. Supp. 227. Where new trial granted unless a reduction of the verdict is stipulated within twenty days, and instead of so stipulating plaintiff appeals from the order, he cannot thereafter have such time extended. *Dembitz v. Orange County Traction Co.*, 147 App. Div. 588, 132 N. Y. Supp. 597. Costs from commencement of action are properly imposed where verdict was due to misleading request of moving party. *Frascone v. Louderback*, 153 App. Div. 199, 138 N. Y. Supp. 370 [aff. in 208 N. Y. 631, 102 N. E. 1103]. Where new trial granted after affirmance on appeal, costs including those on appeal should be imposed as a condition even where imposition of terms not asked for. *Buffalo Cold Storage Co. v. Bacon*, 136 App. Div. 263, 120 N. Y. Supp. 960. In City Court of New York, where motion granted under § 999 of the Code, payment of costs should not be required. *Jones*

v. Marmac Constr. Co., 79 Misc. 368, 140 N. Y. Supp. 228. In City Court of New York, "where a verdict is rendered by a jury under a misapprehension or where the verdict is a compromise one, the party in whose favor the new trial is granted should not be penalized by the imposition of costs." *Scheuer v. Manashaw*, 77 Misc. 208, 211, 137 N. Y. Supp. 534. The Supreme Court, or a justice thereof, in granting an application for a new trial, made by the plaintiff in an action (all of the issues of fact and of law in which have been tried at Special Term before a justice of said court, who has handed down his opinion directing judgment for the defendant, with costs, and the submission of findings on notice, but thereafter and before settling and signing a decision in writing and a judgment, has been designated and has actually begun, to sit in the Appellate Division, and consequently has refused to settle and sign such a decision and judgment for alleged lack of power under the Constitution), has no power to impose the condition that such new trial be had upon the minutes of the former trial before such justice, either alone or with such additional evidence as the parties may introduce upon such new trial. *Williamson v. Randolph*, 185 N. Y. 603, mem. 78 N. E. 745 [affirming on this point 111 App. Div. 539, 97 N. Y. Supp. 949]. When a justice of the Supreme Court has been designated and has actually begun to sit in the Appellate Division before he has settled and signed a formal decision in writing and a judgment in an action, all of the issues of fact and of law in which have been tried before him at a Special Term, but after his opinion has been handed down, specifically announcing his rulings on the facts and the law, and directing judgment for the defendant, with costs, and the submission of findings upon notice; and when such justice has refused to settle and sign such a decision and judgment, for alleged lack of power, under the Constitution, due to such designation, the plaintiff in such action, whose



right to relief therein is denied in said opinion, has an absolute right to a new trial, without terms or conditions, solely by reason of such designation and refusal. *Williamson v. Randolph*, 185 N. Y. 603, mem. 78 N. E. 745. Granting of costs may be refused, in the first department, where the verdict is set aside as not supported by the evidence. *Joseph v. New York City R. Co.*, 61 Misc. 440, 115 N. Y. Supp. 101.

**2742** n. 175. *Eastmond v. McNaught*, 158 App. Div. 903, 142 N. Y. Supp. 1116; *Andrews v. Dresser*, 140 App. Div. 925, 125 N. Y. Supp. 731.

**2742** n. 176. Where there has been a mistrial, costs cannot be imposed. *Terriberry v. Mathot*, 110 App. Div. 370, 97 N. Y. Supp. 20.

**2743.** However, if ground is newly-discovered evidence of false testimony by witnesses for plaintiff as to their relationship to plaintiff, costs should not be imposed. *Bernstein v. Schneider*, 72 Misc. 479, 131 N. Y. Supp. 340. On setting aside a verdict because of a charge of perjury, the costs of the motion and the reference incidental thereto should abide the event. *Chapman v. Delaware, L. & W. R. Co.*, 102 App. Div. 176, 180, 92 N. Y. Supp. 304. On granting a new trial because of surprise, an extra allowance should not be awarded. *Simpson v. Hefter*, 46 Misc. 67, 91 N. Y. Supp. 326. Conditions imposed in particular case, see *Clarke v. Acme Bldg. Co.*, 143 App. Div. 269, 128 N. Y. Supp. 88.

**2743** n. 178. See also *Bolles v. Heckman*, 119 N. Y. Supp. 154. Contra, *Duffy v. New York*, 55 Misc. 25, 105 N. Y. Supp. 68 (reviewing the conflicting decisions). Contra in City Court of New York. *Gottlieb & Son. v. Coutant*, 70 Misc. 380, 127 N. Y. Supp. 250. Contrary rule now established in second department. *Post v. Kerwin*, 150 App. Div. 321, 134 N. Y. Supp. 714. The rule stated in the text is the rule in the second department but not in the third department (*Lashaway v. Young*, 76 App. Div. 177; *People v. Glasgow*, 30 App. Div. 97, 52 N. Y. Supp. 24) nor in the

fourth department (Waltz v. Utica & Mohawk R. Co., 116 App. Div. 563, 101 N. Y. Supp. 968). The first department, however, has overruled its prior decisions and now follows the rule in the third and fourth departments that where the verdict is set aside for excessive or inadequate damages or as against the weight of evidence, i. e., for a mistake of the jury, costs need not be imposed. Rothenberg v. Brooklyn Heights R. R. Co., 135 App. Div. 151, 119 N. Y. Supp. 1001. The court may refuse to impose costs on plaintiff where it does not appear that the verdict resulted from the fraud or mistake of the plaintiff. Waltz v. Utica & M. V. R. Co., 116 App. Div. 563, 101 N. Y. Supp. 968.

**2743** n. 179. Larsen v. United States Mortg. & Trust Co., 104 App. Div. 76, 82, 93 N. Y. Supp. 610; Israel v. Ury, 52 Misc. 525, 102 N. Y. Supp. 871. Contra, Wilmerding v. Feldman, 54 Misc. 626, 104 N. Y. Supp. 776 (holding that costs need not be imposed as a matter of law).

**2743** n. 182. Where a verdict for the plaintiff was set aside and a new trial was granted on condition that the defendant "pay the costs of the trial already had and the disbursements to the date of the order," it was error to include in the costs taxed the costs before notice of trial and four term fees. Myers v. Fox, 129 App. Div. 31, 113 N. Y. Supp. 116.

**2745** n. 193. Order may be modified by permitting party to move for a reargument on new affidavits. Nugent v. Metropolitan St. R. Co., 146 App. Div. 775, 131 N. Y. Supp. 423.

**2745** n. 197. See also Spencer v. Hardin, 149 App. Div. 667, 134 N. Y. Supp. 373.

**2745** § 1960. An order granting a new trial will not be set aside because a wrong reason was given for granting it. Ross v. Metropolitan St. R. Co., 104 App. Div. 378, 382, 93 N. Y. Supp. 679.

**2745** n. 198. *Bannon v. New York Cent. & H. R. R. Co.*, 112 App. Div. 552, 98 N. Y. Supp. 770. Motion for new trial not necessary to preserve for review the ruling on a motion for a nonsuit. *Kraus v. Birnbaum*, 200 N. Y. 130, 93 N. E. 474.

**2745** n. 199. So two independent appeals may be taken. *Gelder v. International Ore, etc., Co.*, 148 App. Div. 637, 133 N. Y. Supp. 214.

**2746** n. 200. *Azzara v. Nassau Electric R. R. Co.*, 134 App. Div. 167, 118 N. Y. Supp. 830; *Robinson v. Interurban St. R. Co.*, 113 App. Div. 46, 98 N. Y. Supp. 918. Especially where four previous trials had all resulted the same. *Pease v. Pennsylvania R. R. Co.*, 137 App. Div. 458, 122 N. Y. Supp. 784. But if new trial has been improperly granted on the judge's minutes, Appellate Division may exercise its own discretion and reinstate the judgment. *Maier v. Duffin*, 134 App. Div. 594, 119 N. Y. Supp. 427. See also post, **3891** n. 261.

## PART XI

### JUDGMENTS

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#### CHAPTER I

##### JUDGMENTS IN GENERAL

**2752** § 1964. The final judgment must follow the terms of the interlocutory judgment. *Reilly v. Freeman*, 109 App. Div. 4, 95 N. Y. Supp. 1069. Interlocutory judgment may be entered on motion for judgment on the pleadings. *Furmans v. Gough*, 70 Misc. 337, 128 N. Y. Supp. 722.

**2753.** Judgment leaving open only a question of accounts to be settled thereafter is a final one although denominated an interlocutory judgment. *Rastetter v. Hoenninger*, 157 App. Div. 553, 142 N. Y. Supp. 962.

**2753** n. 11. See also *Keyes v. Smith*, 183 N. Y. 376, 76 N. E. 473.

**2754** n. 14. Judgment on failure to answer after demurrer overruled is a final judgment. *Kramer v. Barth*, 79 Misc. 80, 139 N. Y. Supp. 341.

**2754** § 1965. An order for a judgment is not a final judgment although entitled as such; and where the action is tried by a jury such an order should be set aside. *Marsh v. Johnston*, 123 App. Div. 596, 108 N. Y. Supp. 161.

**2755** § 1966. Except where a severance is permitted, separate or successive judgments cannot be entered in the same action. Hence, in an action for an accounting, an

interlocutory judgment for an accounting cannot be entered as against one defendant whose answer has been stricken as frivolous, before decision as to the other defendants. *Baumfeld v. German Theatre*, 135 App. Div. 497, 120 N. Y. Supp. 349.

**2755** n. 22. *Sayre v. Progressive Const. & L. Co.*, 159 App. Div. 799, 144 N. Y. Supp. 897.

**2756** § 1967. "Mere findings of law have no place in the judgment and should be stricken therefrom." *Lehigh Valley R. Co. v. Canal Bd.*, 204 N. Y. 471, 477, 97 N. E. 964. "Under no rule of practice is there any justification for inserting in a judgment a provision for the issuance of an execution against the person, and much less for quoting extracts from the judge's charge to the jury." *Curtiss v. Jebb*, 203 N. Y. 538, 539, 96 N. E. 120. When a jury has found a verdict for one of the parties to the action, the judgment should recite the verdict, and should be in form a judgment for the party in whose favor the verdict was rendered, upon the issues in the action, and such a judgment is necessarily upon the merits, and no statement in the judgment that it is upon the merits is necessary to determine its effect. *Folcarelli v. Ward*, 130 App. Div. 316, 116 N. Y. Supp. 1093. In an action for partition the issues of fact were brought on for trial at a trial term, at which time the parties stipulated that the jury should be dismissed and the case proceed before the justice presiding at the trial term, to the same effect as if the trial had been had before said justice sitting at Special Term. The trial proceeded pursuant to such stipulation, the proposed findings of fact and conclusions of law were duly passed upon, and plaintiffs served notice of motion for judgment and a proposed decision of the Special Term. Such decision was in form a decision of the Special Term held by another justice, and recited that the action had come on for trial at the Special Term, and the proceedings at the trial term, and also contained findings of fact

and conclusions of law made by the justice before whom the case was tried. After the interlocutory judgment had been entered in accordance with such proceedings, defendant moved to resettle the decision and interlocutory judgment by reciting therein the notice of motion for judgment, the affidavits submitted in opposition thereto, and the requests to find passed upon by the justice before whom the case was tried. It was held that defendant was entitled to have the interlocutory judgment, but not the decision, resettled by reciting therein such papers, and that it was not sufficient for the court to direct that such papers be annexed to the judgment roll. *Adams v. Bristol*, 108 App. Div. 303, 95 N. Y. Supp. 628. Judgment of dismissal, in an action tried without a jury, as on the merits, where dismissal was because action was prematurely brought, see *Ruegamer v. Cieslinski*, 93 N. Y. Supp. 599.

2756 n. 32. "Although the judgment is in form 'on the merits,' the presumption is that it was not because it is unsupported by verdict or finding of fact, and it is manifest that the complaint might have been dismissed upon a ground not involving the merits." *Jones v. Gould*, 145 App. Div. 271, 275, 129 N. Y. Supp. 1033. "It is fundamental that a judgment upon the merits must rest upon findings of fact expressed in some form either by the verdict of a jury or by the findings of the court, otherwise the judgment has nothing to support it. The fact that the dismissal was stated to be 'on the merits,' and the judgment entered in that form apparently by direction of the court does not establish that judgment as a conclusive one. Even where a judgment has been entered upon a directed verdict it is not a bar if the verdict might have been directed upon the merits, but only if it must have been so directed." *Jones v. Gould*, 145 App. Div. 271, 275, 129 N. Y. Supp. 1033.

2756 n. 33. *Hopedale Electric Co. v. Electric Storage Battery Co.*, 132 App. Div. 348, 116 N. Y. Supp. 859.

Words "either before or after a trial" do not refer to a judgment of dismissal for failure to give security for costs. *Jones v. Sabin*, 122 App. Div. 666, 107 N. Y. Supp. 508. On sustaining a demurrer to the complaint, a dismissal on the merits is improper unless the facts cannot be changed by amendment or there would be no legal liability on the facts. *Brown v. Utopia Land Co.*, 118 App. Div. 364, 103 N. Y. Supp. 50.

**2756 n. 34.** *Kling v. Corning News Co.*, 208 N. Y. 334, 101 N. E. 897; *Kaplan v. Friedman Constr. Co.*, 148 App. Div. 14, 132 N. Y. Supp. 233; *Jones v. Gould*, No. 1, 145 App. Div. 271, 129 N. Y. Supp. 1038; *Meschneck v. Brooklyn, Q. C. & S. R. Co.*, 125 App. Div. 265, 109 N. Y. Supp. 594; *Keuthen v. Stache*, 121 App. Div. 521, 106 N. Y. Supp. 198; *Dixon v. Marlow*, 104 N. Y. Supp. 762; *Molloy v. Whitehall Portland Cement Co.*, 116 App. Div. 839, 102 N. Y. Supp. 363; *Freedman v. Sirota*, 109 App. Div. 874, 96 N. Y. Supp. 812; *Weeks v. Van Ness*, 104 App. Div. 7, 93 N. Y. Supp. 337. Nonsuit because action premature. *Anderson v. Rosenberg*, 121 App. Div. 424, 106 N. Y. Supp. 171. When after the trial judge had indicated that he would grant a nonsuit, both parties submitted to him requests for findings of fact and conclusions of law upon which he made findings on the merits on which a judgment was entered dismissing the complaint and no application was made to amend the judgment, which was unanimously affirmed by the Appellate Division, such judgment is one not of nonsuit but on the merits. *Oakes Mfg. Co. v. New York*, 206 N. Y. 221, 99 N. E. 540.

**2757 n. 36.** Findings of trial judge should not be in judgment in an equity suit. *Porter v. International Bridge Co.*, 200 N. Y. 234, 93 N. E. 716.

**2758 n. 53.** *Selley v. Irish Industrial Exp. & Amusement Co.*, 53 Misc. 46, 102 N. Y. Supp. 1006.

**2759 § 1968.** Where a joint liability is alleged and proved,

judgment must be taken against all the defendants although but one is served. *Abromovitz v. Markowitz*, 58 Misc. 231, 108 N. Y. Supp. 1044. When the liability is several and not joint, a judgment cannot be taken against some of the defendants only for the full amount due. *Whaples v. Fahys*, 109 App. Div. 594, 96 N. Y. Supp. 323.

2759 n. 54. See *Bauer v. Hawes*, 115 App. Div. 492.

2760 n. 56. *Lapinsky v. Colish*, 61 Misc. 319, 113 N. Y. Supp. 733; *Lawton v. Partridge*, 111 App. Div. 8, 97 N. Y. Supp. 516. Joint liability of all of defendants need not be shown. *Alaska v. Banking, etc., Co. v. Van Wyck*, 146 App. Div. 5, 130 N. Y. Supp. 563.

2760 n. 60. *Frascone v. Louderback*, 153 App. Div. 199, 138 N. Y. Supp. 370; *Tanzer v. Breen*, 131 App. Div. 654, 116 N. Y. Supp. 110.

2760 n. 63. *Alaska Banking & Safe Deposit Co. v. Van Wyck*, 146 App. Div. 5, 130 N. Y. Supp. 563.

2761 n. 64. *Blewett v. Hoyt*, 118 App. Div. 227, 103 N. Y. Supp. 451. Relief to which plaintiff is entitled may be ordered in advance of decision of issues between defendants. *New York v. Montague*, No. 1, 149 App. Div. 475, 134 N. Y. Supp. 87 [rev. 74 Misc. 521, 134 N. Y. Supp. 520].

2761 n. 65. *Knickerbocker Trust Co. v. Oneonta, C. & R. S. R. Co.*, 188 N. Y. 38 (holding that it is not enough that a codefendant has served an answer on the complaining defendant).

2762 n. 78. In an action for an accounting affirmative relief may be granted defendant although not prayed for. *Consolidated Fruit Jar Co. v. Wisner*, 110 App. Div. 99, 97 N. Y. Supp. 52.

2763 § 1969. A prayer for such further judgment as may be necessary may sustain a personal judgment in an action to foreclose a mechanic's lien. *Schenectady Contracting Co. v. Schenectady R. Co.*, 106 App. Div. 336, 94 N. Y. Supp. 401.



**2763** n. 83. This Code provision is now Cons. Laws, c. 14, § 51.

**2763** n. 84. *Emmet v. Runyon*, 139 App. Div. 310, 123 N. Y. Supp. 1026.

**2763** n. 85. *Prall v. Hoadley*, 134 App. Div. 447, 119 N. Y. Supp. 301; *Hookey v. Greenstein*, 119 App. Div. 209, 104 N. Y. Supp. 621. *Hasbrouck v. New Paltz H. & P. Traction Co.*, is officially reported in 98 App. Div. 563. See also *Knickerbocker Trust Co. v. Oneonta, C. & R. S. R. Co.*, 116 App. Div. 78, 101 N. Y. Supp. 241 (where default at trial is treated as equivalent to default in service of answer). See *Kienle v. Fred Gretsche Realty Co.*, 133 App. Div. 391, 117 N. Y. Supp. 500.

**2763** n. 87. See also *Mathot v. Triebel*, 102 App. Div. 426, 92 N. Y. Supp. 512.

**2764** n. 90. *Mathot v. Triebel*, 102 App. Div. 426, 92 N. Y. Supp. 512.

**2764** n. 95. *Rastetter v. Hoenninger*, 157 App. Div. 553, 142 N. Y. Supp. 962; *Hayes v. American Bridge Co.*, 127 App. Div. 576, 111 N. Y. Supp. 883; *Abromovitz v. Markowitz*, 58 Misc. 231, 108 N. Y. Supp. 1044; *Epstein v. Cohen*, 56 Misc. 519, 107 N. Y. Supp. 148; *Bradt v. McClenahan*, 118 App. Div. 768, 103 N. Y. Supp. 884; *Hecla Iron Works v. Hall*, 115 App. Div. 126, 100 N. Y. Supp. 696; *Polhemus v. Polhemus*, 114 App. Div. 781, 100 N. Y. Supp. 263; *Hoyne v. Slattery*, 49 Misc. 260, 97 N. Y. Supp. 352. See also *Kerwan v. Hellman*, 110 App. Div. 655, 97 N. Y. Supp. 55. Compare *Messenger v. Chambers*, 53 Misc. 117, 103 N. Y. Supp. 1100. Where the complaint alleges a contract but the contract is void under the statute of frauds, a recovery on a quantum meruit is not allowable where the question as to the value of the services is not litigated on the trial and the complaint which contains no allegations on which such recovery can be founded is not amended. *Banta v. Banta*, 103 App. Div. 172, 93 N. Y. Supp. 393. Where

plaintiff alleged that on or about January 1, 1900, defendant hired him to work for it for the period of one year, beginning January, 1900, judgment cannot be recovered on evidence of employment antecedent to that year and a holding over for another year. *Treffinger v. M. Groh's Sons*, 100 App. Div. 433, 91 N. Y. Supp. 837. Parties may consent to try an issue not pleaded. *Engel v. Sontag*, 110 N. Y. Supp. 933.

**2765.** Where defendant in his answer admits indebtedness in part, plaintiff is entitled to judgment for amount admitted. *Lobel-Andrews Co. v. P. J. Carlin Const. Co.*, 105 N. Y. Supp. 356. Where plaintiff sues for an injunction and for past damages, and the case is tried at Special Term, a judgment for damages only cannot be rendered, where defendant set up in his answer that there was a full and adequate remedy at law. *Sadlier v. City of N. Y.*, 104 App. Div. 82, 93 N. Y. Supp. 579 [affirmed in 185 N. Y. 414]. To same effect, see *Western Union Tel. Co. v. Electric Light & Power Co.*, 178 N. Y. 325, 329. And the fact that the defendant noticed the case for trial at the Special Term under its stipulation to that effect does not alter the rule. *Sadlier v. New York*, 104 App. Div. 82, 93 N. Y. Supp. 579.

**2765 n. 96.** *Davis v. Rosenzweig Realty Operating Co.*, 192 N. Y. 128, 84 N. E. 943; *Garrett v. Cohen*, 63 Misc. 450, 117 N. Y. Supp. 129.

**2765 n. 101.** See *Maass v. Rosenthal*, 125 App. Div. 452, 109 N. Y. Supp. 917. "When a cause of action in equity is not alleged, and timely objection is interposed, the court cannot retain the cause and grant the legal remedy even though the prayer for relief is in the alternative." *Hollander v. Lustik*, 79 Misc. 103, 108, 140 N. Y. Supp. 659. If a party brings an equitable action even now, when the same court administers both systems of law and equity, the party must maintain his equitable action upon equitable grounds or fail, even though he may prove a good cause of action at

law on the trial. *Loeb v. Supreme Lodge of Royal Arcanum*, 198 N. Y. 180, 91 N. E. 547.

**2765** n. 102. There is a considerable conflict of opinion (1) as to whether a complaint which sets up an equitable cause of action with a demand solely for equitable relief is demurrable for failure to state a cause of action where a legal cause of action is also contained in the same facts alleged in the complaint (see vol. 1, pp. 1000, 1001), and (2) as to whether, where a complaint seeks both equitable and legal relief, and it appears on the trial at Special Term that only legal relief can be granted, the complaint should be dismissed or the cause sent to a jury for trial, or the Special Term should retain the case and grant the legal relief. In the cases of *Miller v. Edison Elec. Illuminating Co.*, 184 N. Y. 17, and *Tucker v. Edison Elec. Illuminating Co.*, 100 App. Div. 407, 91 N. Y. Supp. 439, the action was to enjoin a nuisance and to recover damages. It appeared before trial, but not on the motion to send the case to the trial term calendar which was denied, that pending the action the nuisance had been so far abated that an injunction should not be issued. It was held that the Special Term had power to assess the damages and that a judgment for legal relief was proper. The case of *McNulty v. Mt. Morris Electric Light Co.*, 172 N. Y. 410, was distinguished on the ground that in that case the fact that plaintiff was not entitled to injunctive relief because of events occurring after the commencement of the action was shown at the time the motion was made to send the case to the trial term for trial by jury. *McLaughlin, J.*, wrote a dissenting opinion in which *Van Brunt, P. J.*, concurred. In the dissenting opinion will be found the cases which support the contrary rule. Personal judgment not necessary nor justified by the evidence will not be awarded in a suit in equity. *Wasey v. Holbrook*, 141 App. Div. 336, 125 N. Y. Supp. 1087.

**2765** n. 105. But where a complaint contains a state-

ment of acts constituting a cause of action on a contract, which is sustained by proof, a recovery is authorized though the complaint also contains allegations of a tort. *Connor v. Philo*, 117 App. Div. 349, 102 N. Y. Supp. 427; *Booth v. Englert*, 105 App. Div. 284, 94 N. Y. Supp. 700.

**2766** n. 107. *Rosenfeld v. Central Vermont R. Co.*, 111 App. Div. 371, 97 N. Y. Supp. 905.

**2766** n. 113. *Quayle & Sons v. Brandow Printing Co.*, 116 App. Div. 9, 101 N. Y. Supp. 323.

**2767** n. 116. *Brown v. Cole*, 105 N. Y. Supp. 196; *Union Bag & Paper Co. v. Allen Bros. Co.*, 107 App. Div. 529, 95 N. Y. Supp. 214.

**2768** n. 118. *Persons v. Gardner*, 122 App. Div. 167, 106 N. Y. Supp. 616. See *In re Ryer*, 120 App. Div. 154, 104 N. Y. Supp. 804.

**2771**. Notice of settlement of form of judgment or decision need not be served on the defeated party. *Pond v. New Rochelle Water Co.*, 140 App. Div. 141, 124 N. Y. Supp. 1033.

**2774** § 1974. "If the judgment on the demurrer is predicated upon the omission of certain essential allegations of facts which could be supplied by an amendment, the decision of the court is not then that the facts alleged show that the plaintiff has not a cause of action but that because certain other facts are not alleged a cause of action is not set forth and the merits of the plaintiff's cause of action are not determined. In other words the test is, does the insufficiency relate to the facts alleged or to the allegation of the facts? If the former, the judgment is upon the merits; if the latter it is not." *Pollak v. Dodge Mfg. Co.*, 81 Misc. 216, 217, 142 N. Y. Supp. 495.

**2774** n. 160. See also ante, **1014**.

**2774** n. 161. *Selley v. Irish Industrial Exp.*, 53 Misc. 46, 102 N. Y. Supp. 1006.

**2776** n. 171. See also *McCrea v. Robinson*, 51 Misc. 330, 100 N. Y. Supp. 328.

**2778 n. 177.** A motion for judgment in an equity suit after certain specific questions of fact have been answered by a jury must be made in the county of the venue. *Tefft v. Greenwich & J. R. Co.*, 47 Misc. 26, 95 N. Y. Supp. 205.

**2780 § 1977.** The court does not lose jurisdiction of the motion for final judgment because the argument was brought on during one term and a reargument was heard by the judge after the commencement of his second term of office. *Jewett v. Schmidt*, 45 Misc. 471, 92 N. Y. Supp. 737.

**2781 § 1978.** An erroneous entry on a calendar of the word "dismissed," not made in the presence of the court and not in consequence of its order, is not to be taken as a final judgment dismissing the case. *Ledbetter v. Mandell*, 124 App. Div. 854, 109 N. Y. Supp. 602. Where the judgment entered is not the one rendered, it will be reversed. *Brown v. McKie*, 185 N. Y. 303, 78 N. E. 64.

**2782 n. 193.** Where judgment appears in judgment book, it will be presumed a judgment roll was actually filed in the clerk's office and that it contained the judgment appearing in the judgment book. *Burke v. Kaltenbach*, 125 App. Div. 261, 109 N. Y. Supp. 225.

**2782 n. 194.** *Selley v. Irish Industrial Exp.*, 53 Misc. 46, 102 N. Y. Supp. 1006.

**2782 n. 199.** Where a party dies after the entry of an interlocutory judgment, the final judgment is to be entered in the names of the original parties. *Jewett v. Schmidt*, 45 Misc. 471, 92 N. Y. Supp. 737.

**2782 n. 200.** May be entered over twenty years after its rendition,—presumption of payment being rebutted by moving papers to vacate judgment which state nothing has been paid. *Puls v. New York, L. & W. R. Co.*, 54 Misc. 303, 104 N. Y. Supp. 374.

**2784 n. 206.** Statute does not apply to final order making the award in condemnation proceedings. *In re Pine's*

Stream, etc., in Town of Hempstead, 52 Misc. 61, 114 N. Y. Supp. 681.

**2785 § 1984.** Where, after the reargument of a motion for final judgment after the entry of an interlocutory judgment, a child is born whose interests are such that he would be a necessary party to the action, the court may direct the entry of judgment nunc pro tunc as of the date of the motion for judgment, where prejudice would otherwise result to the successful party from the delay in the decision of the case. *Jewett v. Schmidt*, 45 Misc. 471, 92 N. Y. Supp. 737.

**2785 n. 211.** In suit to dissolve partnership, see *Barclay v. Barrie*, 209 N. Y. 40, 102 N. E. 602.

**2785 § 1985.** Where plaintiff is served with a copy of an interlocutory judgment overruling his judgment and giving him ten days within which to withdraw the same after notice of entry, the notice of entry should be construed as strictly as if it was given to limit the time to appeal. A notice merely stating that the judgment of the Supreme Court was "entered in the office of clerk of this court," without stating in what county, is insufficient. *Tudor v. Ebner*, 109 App. Div. 521, 96 N. Y. Supp. 392.

**2786 n. 216.** *Dearing v. Boss*, 55 Misc. 58, 106 N. Y. Supp. 219.

**2787 § 1991.** Answer of codefendant as to whom action was discontinued need not be included. *Bohnhoff v. Fischer*, 147 App. Div. 672, 132 N. Y. Supp. 603. Affidavits and notice of motion on which an order of reference was granted will, on motion, be stricken from the judgment roll. *Schrader v. Fraenckel*, 113 App. Div. 395, 99 N. Y. Supp. 137.

**2788 n. 225.** An amendment of § 1237 of the Code in 1913 adds the following provision: "Upon an appeal to the Court of Appeals from a judgment or order of the Appellate Division of the Supreme Court, the opinion of the Appellate Division, if any, shall, for the purposes of the appeal, be deemed to be a part of the judgment-roll or appeal papers." This changes

the law as formerly declared in *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520, 78 N. E. 179, which held that the opinion of the lower court, although printed and made a part of the record, forms no part of the judgment roll.

**2788** n. 228. Decisions that a proposed finding of fact, although marked by a referee, will not be considered on appeal where not incorporated in the report (*Holmes v. Seaman*, 117 App. Div. 381, 102 N. Y. Supp. 616; *Elterman v. Hall & Grant Const. Co.*, 117 App. Div. 519; *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410) are now overruled (see ante, **2379** § 1837).

**2789** n. 240. Otherwise where physically incorporated therein. *Steiger v. London*, 138 App. Div. 246, 122 N. Y. Supp. 1028.

**2789** n. 241. Bill of particulars is properly made a part of the judgment roll. *Steiger v. London*, 138 App. Div. 246, 122 N. Y. Supp. 1028.

**2790** n. 245. See *Solomon v. Independent Order, S. J.*, 80 Misc. 396, 141 N. Y. Supp. 313.

**2790** § 1994. Court cannot compel interlocutory judgment for costs to be docketed. *Bleja v. Mager*, 80 Misc. 679, 141 N. Y. Supp. 1016. A judgment of foreclosure of a mortgage cannot be docketed until a deficiency has been ascertained. *French v. French*, 107 App. Div. 107, 94 N. Y. Supp. 1028.

**2791** n. 252. This Code section was extensively amended in 1911 and 1912 which need not be referred to herein.

**2795** n. 269. *Hofferberth v. Nash*, 117 App. Div. 284, 102 N. Y. Supp. 317.

**2795** § 1999. A deficiency judgment in a foreclosure suit may be docketed although more than ten years have elapsed since the referee's report of sale. *Brown v. Faile*, 112 App. Div. 302, 98 N. Y. Supp. 420.

**2796**. A personal decree for the deficiency, in a mortgage foreclosure suit, after the application of the proceeds of sale to pay the mortgage debt, does not have the force and effect

of a judgment at law, and become a lien upon the real property of the person against whom it is taken, until the excess of the mortgage debt over the proceeds of the sale has been ascertained, and a subsequent judgment at law has been docketed. *French v. French*, 107 App. Div. 107, 94 N. Y. Supp. 1026.

**2797 § 2001.** The lien on land taken by condemnation proceedings attaches to the award with all the rights and liabilities which the judgment creditor would have, and be subject to, as to the land. *Van Loan v. New York*, 105 App. Div. 572, 94 N. Y. Supp. 221.

**2798 n. 289.** See also *Holland v. Grote*, 193 N. Y. 262, 86 N. E. 30 [reversing on other grounds, 56 Misc. 370, 107 N. Y. Supp. 667].

**2800 n. 303.** Supreme Court has inherent power over the docket. *Matter of Bloom*, 142 N. Y. Supp. 447. Where judgment is prevented from becoming a lien by bankruptcy proceedings, court may order county clerk to mark the docket book accordingly. *Matter of Bloom*, 142 N. Y. Supp. 447.

**2800 § 2004.** Expiration of lien does not affect right of judgment creditor to sue to set aside fraudulent conveyance. *Holland v. Grote*, 193 N. Y. 262, 86 N. E. 30 [reversing on other grounds 56 Misc. 370, 107 N. Y. Supp. 667].

**2802 n. 310.** See also *infra*, **3095 n. 238**.

**2802 n. 314.** Rule applied where right to sue for award was suspended by statute for four months. *Van Loan v. New York*, 105 App. Div. 572, 94 N. Y. Supp. 221.

**2806 n. 327.** *Clinton v. South Shore Natural Gas & Fuel Co.*, 61 Misc. 339, 113 N. Y. Supp. 289.

**2808 § 2008.** Right to amend, see *County of Westchester v. Trustees L. & W. Orphan House*, 140 App. Div. 188, 124 N. Y. Supp. 1029. Amendment of complaint as condition, see *Prall v. Hoadley*, 134 App. Div. 447, 119 N. Y. Supp. 301. Judgment dismissing complaint may be amended by adding



"upon the merits," in a proper case. *Strodl v. Farish Stafford Co.*, 67 Misc. 402, 122 N. Y. Supp. 608 [aff. 65 Misc. 625, 121 N. Y. Supp. 93].

**2808** n. 340. *Jones v. Gould*, No. 1, 145 App. Div. 271, 129 N. Y. Supp. 1038.

**2808** n. 341. *Pond v. New Rochelle Water Co.*, 140 App. Div. 141, 124 N. Y. Supp. 1033.

**2808** n. 342. *Emmet v. Runyon*, 139 App. Div. 310, 123 N. Y. Supp. 1026; *Beer v. Orthaus*, 125 App. Div. 574, 109 N. Y. Supp. 997. But an amendment of a judgment by striking out a provision for costs, after a decision of the Appellate Division reversing the allowance of costs, is proper. *Carolan v. O'Donnell*, 109 App. Div. 700, 96 N. Y. Supp. 493.

**2809** n. 343. *Pond v. New Rochelle Water Co.*, 140 App. Div. 141, 124 N. Y. Supp. 1033; *Chester v. Buffalo Car Mfg. Co.*, 183 N. Y. 425; *Public Bank of N. Y. City v. Birnbaum*, 117 N. Y. Supp. 237. Cannot change provisions relating to costs. *Smith v. Smith*, 121 App. Div. 480, 106 N. Y. Supp. 137.

**2809** § 2009. Where judgment is evidently not what plaintiff desires, and does not follow the prayer of the complaint, a recital that it was entered on motion of his attorney may be stricken out. *Rector, etc., of St. Stephen's Church v. Rector, etc.*, 134 App. Div. 452, 119 N. Y. Supp. 328. Under § 723 of the Code, the judgment and all proceedings and pleadings in the action may be amended by correcting an error in the name of defendant. *Becker v. Woodcock*, 136 App. Div. 589, 121 N. Y. Supp. 71. Name of plaintiff is amendable. *Tim v. Berrick*, 56 Misc. 351, 107 N. Y. Supp. 665. A defendant not served may move to strike clauses in the judgment affecting him. *Nathan Mfg. Co. v. Edna Smelting & Refining Co.*, 130 App. Div. 518, 114 N. Y. Supp. 1037. Where the judgment erroneously dismisses the complaint "upon the merits," a motion to amend is the

proper remedy. *Freedman v. Sirota*, 109 App. Div. 874, 96 N. Y. Supp. 812. Words "on the merits" may be stricken out in a proper case. *David Stevenson Brewing Co. v. Junction Realty Co.*, 156 App. Div. 271, 141 N. Y. Supp. 271; *Hexter Stable Co. v. New York Taxicab Co.*, 114 N. Y. Supp. 859.

**2809 n. 345.** *Buffalo Commercial Bank v. Nice*, 139 N. Y. Supp. 941.

**2809 n. 347.** See *Ullman v. Tanner*, 127 App. Div. 808, 111 N. Y. Supp. 844.

**2809 n. 349.** May strike out inadvertent insertion of finding of fact not proved or admitted. *Sewing v. Wanamaker*, 139 App. Div. 627, 124 N. Y. Supp. 231.

**2810 n. 355.** The conclusions of law and the judgment must find their basis in the facts, and, when the facts as found absolutely preclude the recovery of a money judgment, an inadvertent direction for such a judgment may properly be eliminated by amendment. *Gennert v. Butterick Publishing Co.*, 133 App. Div. 86, 117 N. Y. Supp. 801.

**2811 n. 363.** *Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786; *Groge v. Ruff*, 126 App. Div. 31, 110 N. Y. Supp. 259.

**2812 § 2013.** The judgment may be amended at Special Term, after the decision of an appeal therefrom in the Court of Appeals, to make the judgment of the Court of Appeals effective, where the Court of Appeals granted leave to apply to the Supreme Court for relief. *Town of Palastine v. Canajoharie Water Supply Co.*, 116 App. Div. 530, 101 N. Y. Supp. 810.

**2813 n. 375.** Supreme Court may strike out the words "on the merits" although the motion is not made within one year after the filing of the judgment roll. *Clark v. Scovill*, 198 N. Y. 279, 91 N. E. 800.

**2813 § 2014.** What terms are proper where amendment

after appeal, see *Town of Palastine v. Canajoharie Water Supply Co.*, 116 App. Div. 530, 101 N. Y. Supp. 810.

**2814 n. 379.** Thus caption of judgment may be so amended. *Buffalo Commercial Bank v. Nice*, 139 N. Y. Supp. 322.

**2815 § 2019.** Judgment by consent will not be vacated. *Glen Falls Ins. Co. v. Extension Development Co.*, 154 App. Div. 305, 138 N. Y. Supp. 939. Where judgment entered is not authorized by law, the party affected may move to vacate it without moving to open the default. *Karon v. Eisen*, 128 N. Y. Supp. 137, 2 Civ. Pro. Rep. (N. S.) 197.

**2815 § 2020.** For 1911 Code amendment, see ante, **636 § 632.** Judgments, whether resulting from decision, verdict or agreement, are solemn instruments, and should not be subject to interference suggested by caprice, interest or afterthought. They should stand irrevocable unless, in furtherance of justice, they should be vacated upon grounds which have been established as authorizing the exercise of the extraordinary power of the court. *McElroy v. Board of Education*, 158 App. Div. 219, 142 N. Y. Supp. 1090. Judgment should be vacated where no decision has been made and filed, in an equity suit. *Hager v. Arland*, 81 Misc. 421, 143 N. Y. Supp. 388. A judgment in an action on a foreign default judgment subsequently vacated is not subject to be set aside as matter of right. *Coakley v. Rickard*, 67 Misc. 592, 124 N. Y. Supp. 801. Where Appellate Division has ordered a new trial, judgment is properly vacated on motion. *Gelder v. International Ore Treating Co.*, 135 N. Y. Supp. 406. Motion to vacate should be made where it is claimed that attorney had no power to make the stipulation on which judgment was entered. *Parham v. Burns*, 135 App. Div. 884, 120 N. Y. Supp. 142. Oral understanding between parties that judgment by consent was not to determine the litigation between the parties, especially where understanding sharply disputed, not ground, it being merged in the

judgment. *McElroy v. Board of Education*, 158 App. Div. 219, 142 N. Y. Supp. 1090. Where a motion to dismiss the complaint made at the close of all the testimony, is denied and no exception taken, the court has no power, after the entry of judgment on the general verdict, to set the judgment and verdict aside and direct judgment absolute for defendant. *Polo v. D'Achille*, 157 App. Div. 294, 142 N. Y. Supp. 506. A default for failure to appear on the day set for trial should not be opened where no excuse is shown. *Rosenfeld v. Central Vt. R. Co.*, 116 App. Div. 851, 102 N. Y. Supp. 322. A judgment will not be set aside on the ground that there has been a mistrial because of the subsequent disqualification of the judge granting a new trial on the minutes so as to require the motion to be made on a case at Special Term. *Stern v. Wabash R. Co.*, 52 Misc. 12. A judgment entered on the report of a referee may be set aside if the referee lacked mental capacity and was shortly afterwards declared insane. *Schoenberg & Co. v. Ulman*, 51 Misc. 83, 99 N. Y. Supp. 650.

2815 n. 388. "It is well settled that in the exercise of its control over its judgments and decrees this court may open them upon the application of any one for sufficient reason in the furtherance of justice, and that this power is inherent and independent of any statutory authority or limitation." *Mendola v. Illinois Surety Co.*, 141 N. Y. Supp. 114, 115. It is ground that judgment is an unjust one and was obtained on improper evidence. *Wood v. Wesley*, 75 Misc. 521, 134 N. Y. Supp. 876.

2816 n. 392. It is no ground that the affidavit on which an attachment issued was sworn to before plaintiff's attorney. *Vreeland v. Pennsylvania Tanning Co.*, 130 App. Div. 405, 114 N. Y. Supp. 1002.

2817 n. 405. Where a judgment is void because of the relationship of the trial judge to a party, it may be vacated on motion. Whether such a judgment is reversible on ap-

peal or the appeal will be dismissed, quere. *Elmira Realty Co. v. Gibson*, 103 App. Div. 140, 92 N. Y. Supp. 913. But the party procuring a judgment cannot attack it for want of jurisdiction of the court rendering it. *People ex rel. Shrady v. Shrady*, 47 Misc. 333, 95 N. Y. Supp. 991.

**2818** n. 410. But it is no ground that defendant was induced to make the contract in suit by fraud. *Adler v. Jung*, 131 N. Y. Supp. 147.

**2819** n. 415. Motion must be promptly made. *Park v. Regan*, 55 Misc. 235, 105 N. Y. Supp. 253. That rule as to collateral attack does not apply to an action on a "foreign" judgment, see *Prichard v. Sigafus*, 103 App. Div. 535, 93 N. Y. Supp. 152.

**2820** n. 418. Illustration of when equity should be resorted to, see *United States Life Ins. Co. v. Hellinger*, 130 App. Div. 415, 114 N. Y. Supp. 885.

**2820** n. 419. *Carlisle v. Barnes* is affirmed in 102 App. Div. 582, 92 N. Y. Supp. 924.

**2820** n. 422. See also *Reich v. Cochran*, 105 App. Div. 542, 94 N. Y. Supp. 404.

**2821** § 2021. Stranger to judgment can impeach it for fraud only when it injuriously affects himself. *Hall v. Hall*, 139 App. Div. 120, 123 N. Y. Supp. 1056. A party not prejudiced cannot move to set aside the judgment because improper as against a coparty. *Schoenberg & Co. v. Ulman*, 51 Misc. 83, 99 N. Y. Supp. 650.

**2821** n. 428. Surviving plaintiff cannot move to vacate because judgment had been entered against a coplaintiff who died before its entry. *Hawkes v. Claffy*, 122 App. Div. 546, 107 N. Y. Supp. 534.

**2824** n. 440. *People v. Santa Clara Lumber Co.*, 60 Misc. 150, 113 N. Y. Supp. 70. Misconduct of juror must be clearly shown. *Eichner v. Metropolitan St. R. Co.*, 114 App. Div. 247, 99 N. Y. Supp. 870.

**2824** n. 448. Where judgment entered by clerk in a case

where he had no authority to do so, there is not a mere irregularity but the judgment is void and may be vacated after the year has passed. *Bouker Contracting Co. v. Neale*, 161 App. Div. 617.

**2824** n. 449. See *Matter of Cartier*, 118 App. Div. 342, 103 N. Y. Supp. 505.

**2825** n. 455. But see *Matter of Cartier*, 118 App. Div. 342, 103 N. Y. Supp. 505; *Riley v. Ryan*, 45 Misc. 151, 91 N. Y. Supp. 952.

**2825** n. 457. Where no guardian ad litem was appointed for an infant plaintiff, the failure is not an irregularity but an "error in fact arising upon the trial." *Byrnes v. Byrnes*, 109 App. Div. 535, 96 N. Y. Supp. 306.

**2826** n. 460. If the two years' limitation has expired before the infant reaches his majority, the motion must be made within one year after he becomes of age. *Byrnes v. Byrnes*, 109 App. Div. 535, 96 N. Y. Supp. 306.

**2826** n. 462. This Code provision does not apply to a mistake or inadvertence of the court as distinguished from that of a party. *Barron v. Feist*, 51 Misc. 589, 101 N. Y. Supp. 72.

**2827** n. 466. *Matter of Cartier*, 118 App. Div. 342, 103 N. Y. Supp. 505; *Riley v. Ryan*, 45 Misc. 151, 91 N. Y. Supp. 952.

**2829** n. 483. *Lack v. Watts*, 140 N. Y. Supp. 126.

**2831** n. 492. *People v. Santa Clara Lumber Co.*, 60 Misc. 150, 113 N. Y. Supp. 70. Does not apply to a motion to set aside a default and vacate a judgment which has been satisfied. *Fluegelman v. Armstrong*, 59 Misc. 506, 110 N. Y. Supp. 967.

**2831** n. 497. This Code provision is now Cons. Laws, c. 41, § 41.

**2834** § 2033. Actual notice of the application must be given. In *re Quackenbush*, 122 App. Div. 456, 106 N. Y. Supp. 773.

**2835 n. 504a.** *Graves Elevator Co. v. Seitz*, 54 Misc. 552, 104 N. Y. Supp. 852.

**2835 n. 505.** This Code provision is now Cons. Laws, c. 12, § 150. See *Guiterman v. Contant*, 60 Misc. 567, 113 N. Y. Supp. 924; *In re Gruber*, 129 App. Div. 297, 113 N. Y. Supp. 923; *Guasti v. Miller*, 203 N. Y. 259, 96 N. E. 416. Motion is properly denied where judgment was for claim not discharged. *Maier v. Maier*, 77 Misc. 145, 135 N. Y. Supp. 1038. Application hereunder not necessary to render a discharge available before a surrogate on an administrator's accounting. *Matter of Peterson*, 137 App. Div. 435, 121 N. Y. Supp. 738. Burden of proof that judgment is not within a bankruptcy discharge is on the party opposing the motion. *Tompkins v. Williams*, 137 App. Div. 521, 122 N. Y. Supp. 152.

**2835 n. 506.** Followed in *Howe v. Noyes*, 47 Misc. 338, 93 N. Y. Supp. 476. The rule is to the contrary since the amendment of the statute by Laws 1899, p. 1340, c. 602. *Walker v. Muir*, 194 N. Y. 420, 87 N. E. 680 [affirming 127 App. Div. 163, 111 N. Y. Supp. 465].

**2836.** A grantee of real estate formerly owned by the bankrupt and on which the judgment is a lien may move to cancel the judgment against the bankrupt, since the right to move is not personal to the bankrupt. *Graber v. Gault*, 103 App. Div. 511, 93 N. Y. Supp. 76.

**2836 n. 510.** *Walker v. Muir*, 194 N. Y. 420, 87 N. E. 680 [affirming 127 App. Div. 163, 111 N. Y. Supp. 465].

**2836 n. 510a.** *Cagliostro v. Indelli*, 53 Misc. 44, 102 N. Y. Supp. 918. The burden rests on the moving party, whether he be the bankrupt or one who has succeeded to the bankrupt's right, to establish the necessary facts to show that the discharge in bankruptcy operated on the debt represented by the judgment. He must show that the debt was scheduled or that the creditor had actual notice or knowledge of the proceeding. *Graber v. Gault*, 103 App. Div. 411, 93 N. Y.

Supp. 76; *Schiller v. Weinstein*, 47 Misc. 622, 94 N. Y. Supp. 763; *Wideenfeld v. Tillinghast*, 54 Misc. 90, 104 N. Y. Supp. 712.

**2836** n. 511. *Dodge v. Kaufman*, 91 N. Y. Supp. 727. So where only one of the judgment debtors is a bankrupt the judgment cannot be discharged as against the others. *In re Quackenbush*, 122 App. Div. 456, 106 N. Y. Supp. 773.

**2837** § 2034. The first sentence of § 1260 of the Code was amended in 1913 by providing for the cancellation of the docket of a judgment, not only by the clerk in whose office the judgment-roll is filed, but also "by the clerk of any county where a transcript of said judgment shall have been docketed." Inasmuch as costs belong to the client, and not to the attorney, the client may satisfy a judgment awarding him costs. *Earley v. Whitney*, 106 App. Div. 399, 94 N. Y. Supp. 728.

**2838** n. 517. This Code provision as to the power of an attorney to execute a satisfaction is limited by § 474 of the Code as to a guardian ad litem, so that where a defendant paid a judgment to the attorney for such a guardian, who had not given the required security, defendant is not protected by the payment. *Greenburg v. New York C. & H. R. R. Co.*, 210 N. Y. 505, 104 N. E. 931.

**2838** n. 518. This Code provision is amended by Laws 1909, c. 310, so as to read "An instrument specified in section two hundred and thirty of the debtor and creditor law is deemed a satisfaction piece," by adding the quoted words.

**2838** n. 519. Mortgagee cannot insist upon preparing the satisfaction piece and charge the mortgagor therefor. *Krulder v. Hillman*, 57 Misc. 209, 107 N. Y. Supp. 727.

**2841** § 2038. The three conditions are in the alternative. The provision as to the lapse of ten years, added by Laws 1896, c. 568, is retroactive so as to apply to a judgment docketed before the passage of the amendment. The judgment of the Marine Court of the city of New York docketed



before the name was changed to the City Court of New York is not the judgment of an extinct court but may be enforced like any other judgment of a court of record. *Peace v. Wilson*, 186 N. Y. 403, 79 N. E. 329.

**2842** n. 531. This provision authorizes the granting of leave to plead a judgment as a counterclaim although its lien is not about to expire. *Rando v. National Park Bank*, 137 App. Div. 190, 121 N. Y. Supp. 1048. An alimony judgment is one for a sum of money within this Code provision. *Shepherd v. Shepherd*, 51 Misc. 418, 100 N. Y. Supp. 401. This Code provision does not apply to an action on a final order made in a special proceeding. *Fenlon v. Paillard*, 46 Misc. 151, 93 N. Y. Supp. 1101.

**2842** n. 534. *Saxe v. Peck*, 139 App. Div. 419, 124 N. Y. Supp. 14; *Fenlon v. Paillard*, 46 Misc. 151, 93 N. Y. Supp. 1101.

**2842** n. 536. An action to charge a joint debtor not personally served in a prior action is not an action upon the former judgment, so as to require leave to sue. *Hofferberth v. Nash*, 117 App. Div. 284, 102 N. Y. Supp. 317.

**2843** § 2039. No action can be brought in this state on a foreign judgment rendered in an action in personam where defendant was served by substituted service and did not appear. *White v. Glover*, 138 App. Div. 797, 123 N. Y. Supp. 482; *Smith v. Oliver*, 65 Misc. 487, 120 N. Y. Supp. 73.

## CHAPTER II

### JUDGMENT BY DEFAULT

**2847** n. 4. A judgment by default is of no effect against "Samuel Durst" where summons was against "Samuel Dust." *Durst v. Ernst*, 45 Misc. 627, 91 N. Y. Supp. 13.

**2847** n. 7. See also *Hawes v. Clarke*, 159 App. Div. 65, 144 N. Y. Supp. 11.

**2848.** If an unverified answer is served, the complaint being verified, on the last day, and is returned within 24 hours, and no verified answer or demurrer is served the next day, default may be entered. *Felix v. Josephthal*, 76 Misc. 267, 134 N. Y. Supp. 923.

**2848 n. 10.** An answer cannot be regarded as a nullity, and judgment be entered as upon a default, because the affidavit of verification of the answer was taken by defendant's attorney. *Zichermann v. Wohlstadter*, 60 Misc. 362, 113 N. Y. Supp. 403.

**2849 n. 23.** *Karon v. Eisen*, 128 N. Y. Supp. 137, 2 Civ. Pro. Rep. (N. S.) 197.

**2851 § 2046.** If the verification of the complaint is insufficient because made by attorney without showing that plaintiff was not within the county when the affidavit was made, the judgment is reversible. *Boyce v. Dumars*, 114 App. Div. 284, 99 N. Y. Supp. 769.

**2852.** If there are two causes of action, both must be causes of action enumerated in the statute. *Bouker Construction Co. v. Neale*, 161 App. Div. 617.

**2853 n. 55.** *Mathot v. Triebel*, 102 App. Div. 426, 92 N. Y. Supp. 512.

**2858 n. 70.** See *Teague v. Ridgway-Thayer Co.*, 130 N. Y. Supp. 86.

**2862 n. 94.** Where, in an action for injury to property, defendant makes default, the damages under Code Civ. Proc., § 1215, can only be ascertained by a writ of inquiry. *Fullerton v. Young*, 46 Misc. 292, 94 N. Y. Supp. 511. A conversion to defendant's own use of money collected by him as agent is an "injury to property," within Code Civ. Proc., § 1215, requiring damages on default in such a case to be ascertained by writ of inquiry. *Id.*

**2863 n. 102.** *Bornstein v. Faden*, 84 Misc. 256, 145 N. Y. Supp. 758.

**2867 § 2054.** In assessing the damages the allegations

of the complaint are required to be treated as true the same as if no answer had been interposed. The damages are assessable as if the defeated party had made default in pleading. *City Trust, Safe Deposit & Surety Co. v. American Brewing Co.*, 181 N. Y. 285.

**2868** n. 132. See *Bornstein v. Faden*, 84 Misc. 257, 145 N. Y. Supp. 758.

**2868** § 2055. A judgment in an action on a foreign judgment must be vacated before the foreign judgment by default can be opened. *Coakley v. Rickard*, 67 Misc. 592, 124 N. Y. Supp. 801. A judgment on motion for judgment on the pleadings cannot be opened as a default judgment. *Schlaepfer v. Frenhaft*, 142 N. Y. Supp. 277. If prior motion for the same relief has been denied by another justice at Special Term, the motion should be denied. *Heischober v. Polishook*, 152 App. Div. 193, 136 N. Y. Supp. 657. The denial of a "motion" to open a default and to be permitted to defend does not preclude an "action" to set aside the judgment. *Everett v. Everett*, 180 N. Y. 452, 461. Where a party is actually represented by counsel in court, fully prepared to try the cause, and such counsel refuses to proceed for the sole reason that he thinks the justice presiding may decide against him, the judgment thus rendered cannot be vacated as though taken by default, and no reason can be suggested for disturbing it which could not be urged with equal force to vacate a judgment alleged to have resulted from the incompetence of the attorney conducting the trial. *Sutter v. New York*, 106 App. Div. 129, 94 N. Y. Supp. 515 [followed in *Herbert Land Co. v. Lorensen*, 113 App. Div. 802, 99 N. Y. Supp. 937].

**2869.** After default opened, judgment cannot afterwards be recovered, by amending complaint, on an original independent cause of action arising after the original action was commenced. *Harris & Co. v. Uebelhoer*, 84 Misc. 146, 145 N. Y. Supp. 903.

**2869** § 2056. Special Term may open a default taken at Trial Term. *Mott v. Mott*, 134 App. Div. 569, 119 N. Y. Supp. 483.

**2869** § 2057. Default in filing bond, as required by order opening default judgment, may be opened where negligence not willful. *Goldstein v. Jones*, 138 N. Y. Supp. 45. Opening default of plaintiff, see *Schmidt v. Brennan*, 156 App. Div. 831, 141 N. Y. Supp. 229. Failure to serve an amended complaint on the party seeking to open a default judgment is not ground for opening, where such complaint was served on a codefendant as to whom the action was served, after the default, and the amendment was unnecessary to state a cause of action against the movant. *Fuller Buggy Co. v. Waldron*, 113 App. Div. 403, 98 N. Y. Supp. 1085. The fact that a defendant not properly served with summons knows of the action and the taking of a default judgment therein, but takes no steps to prevent such judgment, does not preclude his right to move to have the default judgment set aside. *O'Connell v. Gallagher*, 93 N. Y. Supp. 643. "It is entirely obvious that when under the new system a trial judge has heard a motion to postpone on affidavits, to permit the party who made the motion to willfully suffer a default when his motion is denied, and then apply to another judge on motion to open the so-called default, would be appealing from one judge to another, and that is not permissible. His remedy is to appeal from the order of the trial judge to the Appellate Division." *Warth v. Moore Blind Stitcher & Overseamer Co.*, 125 App. Div. 211-215, 109 N. Y. Supp. 116; *People ex rel. Mt. Vernon Trust Co. v. Millard*, 117 N. Y. Supp. 474. Grounds in general, see *Salkind v. Levy*, 116 N. Y. Supp. 581; *Donegan & Swift v. Patterson*, 125 App. Div. 750, 110 N. Y. Supp. 98; *Union Stores Corporation v. Haight*, 126 App. Div. 291, 110 N. Y. Supp. 423; *Julius Johnson's Sons v. Buellesbach*, 56 Misc. 442, 107 N. Y. Supp. 6. Refused in *American Pin Co. v. Tepfer*, 127 App.

Div. 939, 111 N. Y. Supp. 1027; *Lowenthal v. Hodge*, 55 Misc. 374, 105 N. Y. Supp. 670.

**2869** n. 143. See *Reichenbach v. Harris*, 112 N. Y. Supp. 1069.

**2869** n. 145. Especially in a divorce suit. *Mott v. Mott*, 134 App. Div. 569, 119 N. Y. Supp. 483. But not where illness is a mere pretense. *Rycroft v. Pierce*, 150 App. Div. 521, 135 N. Y. Supp. 447.

**2870** n. 147. So where plaintiff's attorney was ten minutes late from an unforeseen delay. *Krasne v. New York R. Co.*, 140 N. Y. Supp. 355. Being late forty-five minutes, at afternoon session of court, where excused, warrants opening. *Hirschfield v. Monahan*, 141 N. Y. Supp. 520.

**2870** n. 148. *Conlin v. King*, 157 App. Div. 897, 142 N. Y. Supp. 1113; *Evans v. White*, 153 App. Div. 881, 137 N. Y. Supp. 1089. See *Pierce, Butler & Pierce Mfg. Co. v. Kleinfeld*, 53 Misc. 260, 103 N. Y. Supp. 86.

**2870** n. 150. See *Carruth v. Rosenthal*, 124 App. Div. 670, 109 N. Y. Supp. 337. Where defendant made no application to postpone the trial because of the illness of one of his attorneys, but instead deliberately abandoned the case and left the county, and he offers no real excuse for his disregard of the case and of the court, the default will not be opened. *Brown v. Huber*, 103 App. Div. 134, 92 N. Y. Supp. 940.

**2870** n. 151. *Kraus v. Comet Film Co.*, 139 N. Y. Supp. 306. Negligence. *Girards v. Rosencrans*, 157 App. Div. 326, 142 N. Y. Supp. 139; *Heiliger v. Ritter*, 78 Misc. 264, 138 N. Y. Supp. 212. Erroneous advice of counsel as to effect of judgment. *Cainen v. New York Contracting Co.*, 53 Misc. 540, 103 N. Y. Supp. 725.

**2871** § 2058. If it seems that default was deliberate, it will not be opened. *Warth v. Moore Blind S. & O. Co.*, 125 App. Div. 211, 109 N. Y. Supp. 216; *Singer v. Maimim*, 120 N. Y. Supp. 78; *Cascade Hotel Co. v. Orleans Real*

Estate Co., 153 App. Div. 882, 137 N. Y. Supp. 1054. "It is not the policy of the law to set aside a default for slight or unconvincing reasons, and where it appears that the default was willfully and intentionally allowed; or that both attorney and client were guilty of negligence, it will not be opened." *Heiliger v. Ritter*, 78 Misc. 264, 266, 138 N. Y. Supp. 212. Where judgment result of voluntary abandonment rather than a default, it will not be set aside. *Demuth v. Kemp*, No. 3, 144 App. Div. 287, 129 N. Y. Supp. 249. Trifling with the court is ground for refusing. *Bitterman v. Weinstein*, 135 App. Div. 910, 120 N. Y. Supp. 401. Second default, resulting from unwillingness to comply with terms of order setting aside first default, should not be opened. *Stringer v. Barker*, 134 App. Div. 491, 119 N. Y. Supp. 424. Where oral agreement that neither party would move the case for trial without informing the other party, is denied by plaintiff, the default will not be opened because thereof. *Empire State Pickling Co. v. Pfister*, 80 Misc. 162, 141 N. Y. Supp. 817. When the proposed defense involves defendant as *particeps criminis*, the default should not be opened. *Tedford v. Lichtenstein*, 131 App. Div. 805, 116 N. Y. Supp. 361. Calendar practice, dismissal of complaint on refusal to proceed with the trial, see *Loehr v. Brooklyn Ferry Co.*, 115 App. Div. 666, 101 N. Y. Supp. 209. Plaintiff's default for want of prosecution should not be opened where no excuse for his delay is shown and more than six years have elapsed. *Meyer v. Crimmins*, 135 App. Div. 911, 120 N. Y. Supp. 353.

2871 n. 163. But see *Bancroft-Graham v. Halley*, 80 Misc. 191, 141 N. Y. Supp. 911.

2872. The Special Term may open a default caused by the misconduct of the attorney of a party; the relief cannot be granted on appeal. *Nahe v. Bauer*, 117 N. Y. Supp. 635.

2873 n. 172. Laches not fatal, see *Hart v. Cram*, 124

App. Div. 487, 108 N. Y. Supp. 925. Where no judgment entered, no laches. *Conlin v. King*, 157 App. Div. 897, 142 N. Y. Supp. 1113. Compare *Girards v. Rosencrans*, 157 App. Div. 326, 142 N. Y. Supp. 139 (where motion granted five years after judgment, defendant not knowing that judgment had been entered until such time).

**2873** § 2063. Where action was dismissed for failure to prosecute, plaintiff's default should not be opened where he gives no excuse for his default, and serves no copy of a proposed complaint or affidavit of merits. *Stout v. White*, 154 App. Div. 921, 139 N. Y. Supp. 77. If plaintiff moves to set aside his default, he must show that he has a good cause of action. *Ginsberg v. N. H. Fire Ins. Co.*, 3 Current Ct. Dec. 58.

**2873** n. 177. See *Slade v. Delaware & Hudson Co.*, 122 App. Div. 338, 106 N. Y. Supp. 887.

**2873** n. 179. *Dehn v. Sherman*, 136 App. Div. 89, 120 N. Y. Supp. 639; *Empire City Iron Works v. Dinciu*, 74 Misc. 85, 131 N. Y. Supp. 572; *Murrell v. Graziade*, 130 N. Y. Supp. 140; *Harvey v. Gillies*, 117 N. Y. Supp. 204; *Wills v. Rowland & Co.*, 117 App. Div. 122, 102 N. Y. Supp. 386. Must apply to amended complaint rather than the original. *Boleman v. Henderson*, 141 App. Div. 887, 126 N. Y. Supp. 710. Affidavit of merits is not sufficient. *Heischober v. Polishook*, 152 App. Div. 193, 136 N. Y. Supp. 567. Sufficient to show a strong presumption against validity of plaintiff's claim. *Rycroft v. Pierce*, 152 App. Div. 792, 137 N. Y. Supp. 950.

**2874** n. 180. *Boleman v. Henderson*, 141 App. Div. 887, 126 N. Y. Supp. 710; *Addressograph Co. v. Goetchius & Co.*, 131 N. Y. Supp. 583; *Ziegler v. Smith*, 115 N. Y. Supp. 99. But see ante, **560** § 545.

**2874** n. 182. Not necessary where ground is that defendant was not served with process. *Hertzberg v. Elvidge*, 79 Misc. 109, 140 N. Y. Supp. 670.

**2874** n. 185. *Reid v. Jackson's Baggage Express*, 107 N. Y. Supp. 633; *Tuska v. Jarvis*, 61 Misc. 224, 113 N. Y. Supp. 767; *Addressograph Co. v. Goetchius & Co.*, 131 N. Y. Supp. 583. Not necessary where ground is that defendant was not served with process. *Hertzberg v. Elvidge*, 79 Misc. 109, 140 N. Y. Supp. 670. That proposed answer is improperly verified does not preclude order. *Miller v. Petters*, 139 N. Y. Supp. 316.

**2875** § 2064. Title to office of city attorney cannot be determined on motion by city to open default. *Santsprey v. Cohoes*, 83 Misc. 317, 145 N. Y. Supp. 281. Where affidavits as to service of summons are conflicting, court should either take the oral evidence of the witnesses or order a reference. *Lack v. Watts*, 140 N. Y. Supp. 126. Affidavit of service of summons held overcome by counter affidavits. *Hertzberg v. Elvidge*, 79 Misc. 109, 140 N. Y. Supp. 670.

**2875** n. 188. *Lack v. Watts*, 140 N. Y. Supp. 126.

**2875** n. 190. See also *Cohen v. Meryash*, 93 N. Y. Supp. 529. "The court, while having discretion to excuse defaults, does not have unlimited discretion. The Code of Civil Procedure (section 724) states when a default may be excused. It is when the judgment is taken by 'mistake, inadvertence, surprise or excusable neglect.' The judgment in this action was not taken by mistake, inadvertence, surprise, or excusable neglect. It was taken because the plaintiff absolutely refused without excuse to appear, and because he preferred to have his default taken and then speculate on what the court might do when he applied to have such default excused. Parties cannot trifle with the court in this way. 'If they choose to do so, they must abide by the consequences.'" *Prager v. Beardsley*, 118 N. Y. Supp. 232. Should not be granted as a matter of course. *Miller v. Samson*, 84 Misc. 412.

**2875** n. 192. Discretion is reviewable on appeal. *Heiliger v. Ritter*, 78 Misc. 264, 138 N. Y. Supp. 212. Review of



discretion by Appellate Division, see *Tierney v. Helvetia Swiss Fire Ins. Co.*, 126 App. Div. 446, 110 N. Y. Supp. 613.

**2875** § 2065. After an inquest, the default should not be opened on payment merely of motion costs, but there should be added a trial fee and plaintiff's disbursements. *Siegel v. Frankel*, 93 N. Y. Supp. 533.

**2875** n. 193. See *Lewis v. Bailey*, 66 Misc. 557, 121 N. Y. Supp. 931; *Fuller Buggy Co. v. Waldron*, 113 App. Div. 403, 98 N. Y. Supp. 1085 (payment of costs). Terms cannot be imposed, however, where the judgment was prematurely entered, due and timely service of an answer by mail having been made. *Auto Lighter Co. v. Wicks, Hughes & Co.*, 114 App. Div. 110, 99 N. Y. Supp. 611. Requiring trustee in bankruptcy to furnish \$5,000 undertaking held improper. *McLoughlin v. Collins Bldg. & Const. Co.*, 119 App. Div. 300, 104 N. Y. Supp. 620. Terms imposed as inadequate, see *Fellenn v. Reinhardt*, 130 App. Div. 444, 114 N. Y. Supp. 1023. Costs and disbursements. *Girards v. Rosencrans*, 157 App. Div. 326, 142 N. Y. Supp. 139. No costs should be imposed where counsel was actually engaged in court and an affidavit to that effect was presented to the trial court. *Kuber v. Gamache*, 130 N. Y. Supp. 158. Terms imposed in particular case, see *Rycroft v. Pierce*, 152 App. Div. 792, 137 N. Y. Supp. 950.

**2875** n. 194. See *Schmidt v. Brennan*, 156 App. Div. 881, 141 N. Y. Supp. 229. Terms should be imposed where opened as a matter of favor, where defendant is in default because of reliance on a verbal extension of time to answer. *Friedland v. Commonwealth Fire Ins. Co.*, 136 App. Div. 6, 120 N. Y. Supp. 126. But if default of defendant is opened, costs cannot be imposed on plaintiff. *Felix v. Josephthal*, 76 Misc. 267, 134 N. Y. Supp. 923. Payment of costs should not be ordered as against wife on opening default in divorce suit. *Fox v. Fox*, 143 App. Div. 483, 127 N. Y. Supp. 989. In City Court of New York may require

cause to be placed on short cause calendar. *Peck v. Kamsler*, 104 N. Y. Supp. 346. Payment of taxable costs and disbursements to date required. *Page v. Dempsey*, 117 N. Y. Supp. 1052.

**2876** n. 197. Immediate trial. *Girards v. Rosencrans*, 157 App. Div. 326, 142 N. Y. Supp. 139.

**2876** n. 205. It seems that the failure to pay the costs may be waived, however, by failing to urge the objection on the hearing of a motion for an adjournment, so that a tender of the costs upon the trial day will be sufficient. *Rickert v. Pollock*, 48 Misc. 348, 95 N. Y. Supp. 578.

**2876** n. 206. Bond to pay any judgment which plaintiff may recover includes a judgment by consent or by subsequent default. *E. R. Thomas Motor Branch Co. v. United States Fidelity & G. Co.*, 153 App. Div. 32, 137 N. Y. Supp. 1094.

**2877** n. 207. *Girards v. Rosencrans*, 157 App. Div. 326, 142 N. Y. Supp. 139; *Fuller Buggy Co. v. Cudney*, 50 Misc. 49, 100 N. Y. Supp. 282 [citing 3 Nichols' Pr. 2877], (which also holds that the judgment should not be canceled while an appeal is pending from a judgment for defendant).

### CHAPTER III

#### JUDGMENT BY CONFESSION

**2880.** Corporation may execute note authorizing confession of judgment. *Holmes v. Saint Joseph Lead Co.*, 84 Misc. 279, 147 N. Y. Supp. 104.

**2880** n. 1. Part of this Code provision is embodied in Cons. Laws, c. 14, § 51.

**2881** n. 19. Code provision is now Cons. Laws, c. 23, § 193.

**2883** n. 38. *Anderson v. Shutts*, 114 App. Div. 308, 99 N. Y. Supp. 893.



## PART XII

### COSTS AND FEES

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#### CHAPTER I

##### COSTS

**2901 § 2077.** Costs cannot be awarded in a proceeding to punish for criminal contempt, since there is no statutory authority therefor. *People ex rel. Stearns v. Marr*, 181 N. Y. 463, 471, 74 N. E. 431. Neither party is entitled to costs on the abatement of an action by the death of defendant. *People v. Newcomb*, 75 Misc. 258, 135 N. Y. Supp. 151.

**2901 n. 16.** *Matter of New York City*, 66 Misc. 488, 122 N. Y. Supp. 321. Condemnation proceedings. *Matter of Rapid Transit Com'rs*, 197 N. Y. 81, 90 N. E. 456.

**2902 § 2078.** In an equitable action the costs are within the discretion of the trial court, and, when that court has once exercised its discretion by awarding costs, it cannot afterwards amend its decision and judgment by withholding them. *Gennert v. Butterick Publishing Co.*, 133 App. Div. 86, 117 N. Y. Supp. 801.

**2903 n. 29.** Construction of stipulation, see *Young v. Woof*, 160 App. Div. 252, 145 N. Y. Supp. 535.

**2903 n. 31.** Where costs are discretionary, however, no stipulation of counsel as to the amount that shall be imposed can control the exercise of such discretion. *Brodie v. O'Donnell*, 71 Misc. 530, 130 N. Y. Supp. 805 [quoting *Cowen v. King*, 54 App. Div. 331].

**2906 § 2084.** An action for malicious prosecution is one at law so that defendant is entitled to costs as of right when the verdict is in his favor. *Stearns v. Titus*, 114 App. Div. 197, 99 N. Y. Supp. 667. A successful codefendant, although he appears by the same attorney as another defendant, is entitled to costs. *Ingeman v. Snare & T. Co.*, 158 App. Div. 915, 143 N. Y. Supp. 840.

**2906 n. 53.** *Weber Bunke Lange Coal Co. v. Chellborg*, 139 App. Div. 602, 124 N. Y. Supp. 62; *New York v. Ackerman*, 51 Misc. 424, 101 N. Y. Supp. 687. It follows that an order for dismissal of the complaint cannot be made conditional on a waiver of the costs of the action by defendant, unless the plaintiff should appeal, in which case defendant was to have his costs. *Thiel v. Schonzeit*, 104 App. Div. 151, 93 N. Y. Supp. 383. Where dismissal is for failure to prosecute. *Wetzler v. Silverman*, 123 N. Y. Supp. 794.

**2906 n. 54.** So where defendant's counterclaim is dismissed. *Gibbons v. Skinner*, 150 App. Div. 706, 135 N. Y. Supp. 820.

**2906 n. 55.** But see post, **2907 § 2085.**

**2906 n. 56.** In such a case defendant is entitled to costs. *Rohrs v. Rohrs*, 72 Misc. 108, 130 N. Y. Supp. 1093.

**2907 § 2085.** If plaintiff obtains a verdict for the property and six cents damages, and defendant gets a six cent verdict on a counterclaim, plaintiff only is entitled to costs. *Peck v. Haverstraw Water Supply Co.*, 81 Misc. 428, 142 N. Y. Supp. 765.

**2907 n. 60.** In action for damages for trespass, claim of title held to arise on the pleadings. *Bowen v. Holdredge*, 134 App. Div. 855, 119 N. Y. Supp. 199.

**2915 n. 119.** This Code provision is now Cons. Laws, c. 13, § 101.

**2915 n. 120.** This Code provision is now Cons. Laws, c. 13, § 28.

**2918 n. 143.** No costs where recovery less than fifty

dollars. *Gaetjens v. New York*, 145 App. Div. 640, 130 N. Y. Supp. 405.

**2919** n. 152. See also post, **3969** § 2881.

**2920** § 2089. *Girbekian v. Costikyan*, 126 App. Div. 812, 111 N. Y. Supp. 243; *De Leon v. Brooklyn Heights R. Co.*, 125 App. Div. 752, 110 N. Y. Supp. 571. See *Bloomington v. Waite*, 58 Misc. 357, 109 N. Y. Supp. 671. Does not apply to costs given a prevailing party on appeal. *La Rosa v. Wilner*, 54 Misc. 574, 104 N. Y. Supp. 952. Words "personally served" in statute do not exclude voluntary general appearance as equivalent. *Swartz v. New York City R. Co.*, 119 App. Div. 889, 105 N. Y. Supp. 352; *Hubbard v. Heinze*, 145 App. Div. 828, 130 N. Y. Supp. 542. *Contra*, *Swartout v. Scheideberg*, 68 Misc. 133, 123 N. Y. Supp. 792. The fact that one of defendants was not personally served but appeared voluntarily does not take a case out of the statute. *Brumberg v. Lipman*, 110 N. Y. Supp. 979. Code provision not applicable where suit could not be brought in City Court of New York because defendant resided in Brooklyn. *Putnam's Sons v. Pickett*, 152 App. Div. 814, 137 N. Y. Supp. 805 [rev. 77 Misc. 286, 135 N. Y. Supp. 877]. Does not apply, so far as City Court of New York is concerned, where Municipal Court has no jurisdiction. *Smith v. A. J. Walker-Stoops Co.*, 131 N. Y. Supp. 676. Offer of defendant to appear in any action plaintiff might bring does not confer jurisdiction on the City Court. *Putnam's Sons v. Pickett*, 152 App. Div. 814, 137 N. Y. Supp. 805 [rev. 77 Misc. 286, 135 N. Y. Supp. 877]. Does not apply to action in Westchester County, changed to New York County, and then again transferred to the former county where it was tried. *Seymour v. Wheeler*, 137 App. Div. 52, 122 N. Y. Supp. 183. Each county stands separate in the application of the statute, and it does not apply to an action brought and tried in Queens County, although defendant was personally served in Kings County. *Burgdorf v. Brooklyn, Q. C. & S. R. Co.*,

130 App. Div. 253, 114 N. Y. Supp. 718. The statute does not require a resident of Kings County to bring his action in the City Court of New York, each county being considered separately. *Waldstreicher v. Solomon*, 127 App. Div. 364, 111 N. Y. Supp. 500. But see *De Leon v. Brooklyn Heights R. Co.*, 125 App. Div. 752, 110 N. Y. Supp. 751. The last clause of this Code subdivision does not preclude the recovery of costs by defendant in any event. It merely prevents the recovery of costs where no offer of judgment is made and plaintiff succeeds but recovers less than \$500. *Patterson v. Woodbury Dermatological Inst.*, 117 App. Div. 600, 102 N. Y. Supp. 790. The amount of recovery, and not the amount claimed, is the test; and a sum accepted, pending suit, is not a "recovery" within the statute. *Hill v. Kann*, 50 Misc. 360, 98 N. Y. Supp. 682. Where plaintiff recovers less than \$50, defendant is entitled to costs. *Streat v. Wolf*, 132 App. Div. 872, 117 N. Y. Supp. 449. Value of property replevied is test. *Smith v. A. J. Walker-Stoops Co.*, 131 N. Y. Supp. 676. As to this matter, by amendment in 1910, in so far as relating to actions in the Supreme Court for New York County, it is provided that, if the action might, except for the amount claimed, have been brought in the City Court of the City of New York, the plaintiff shall not have costs or disbursements "unless he shall recover one thousand dollars or more." As to actions in the Supreme Court for Kings County, there is, under the amended section, a similar provision prohibiting the plaintiff from recovering costs or disbursements in an action which might have been maintained in the Kings County Court unless he shall recover \$500 or more. The intent of this 1910 amendment was to prevent a party from risking the loss of the costs by suing in the Supreme Court in the county of his actual residence and serving the defendant in that county; the county where defendant is actually served and not the one where he might have been served being the test. *Moraff v. Kohn*, 157 App.

Div. 648, 142 N. Y. Supp. 775. There was also added, by amendment in 1910, this provision: "In all actions hereafter originally brought in the supreme court, triable in the county of Albany, and in which the defendant is a resident of the county of Albany, which could have been brought, except for the amount claimed therein, in the county court of the county of Albany, the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more." The last sentence of the Code provision was further amended in 1914 (c. 80) by adding, after the words "triable in the" the following: "supreme court or county court of a county contained wholly within a city of the first class." This provision was also amended in 1914 by adding the following clause: "In all actions hereafter brought in the Supreme Court, triable in the counties of Bronx and Queens, and in which the defendant is a resident of the county where the action is brought, which could have been brought, except for the amount claimed therein, in the county court of the counties of Bronx and Queens, the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more."

**2921 § 2091.** There are not two causes of action where one of them is a counterclaim. *Rohrs v. Rohrs*, 72 Misc. 108, 130 N. Y. Supp. 1093.

**2922 n. 165.** *La Rosa v. Wilner*, 54 Misc. 574, 104 N. Y. Supp. 952. Provision does not apply where plaintiff is successful in suit to recover land and damages for its detention, although defendant recovers on a counterclaim for interference with an easement. *Peck v. Haverstraw Water Supply Co.*, 81 Misc. 428, 142 N. Y. Supp. 765.

**2922 n. 167.** If judgment reversed as to defendant, his right to costs falls. *Taylor v. New York Life Ins. Co.*, 148 App. Div. 815, 133 N. Y. Supp. 746.

**2923 n. 177.** *Gearty v. Mayor, etc., of N. Y.*, 134 App. Div. 216, 121 N. Y. Supp. 1030.



**2925** n. 185. *Blydenburgh v. Ely*, 161 App. Div. 91.

**2925** n. 186. *Shaffer v. Shaffer*, 110 App. Div. 487, 97 N. Y. Supp. 411.

**2925** n. 189. Granting of, and amount of (up to statutory limit) are discretionary. *Paley v. Smith*, 74 Misc. 560, 132 N. Y. Supp. 152. "An action brought under section 2653a is not an action falling within the provisions of section 3228 and section 3229 of the Code, but under the provisions of section 3230, and therefore the court has the power to award costs to any party to the litigation, even to an unsuccessful plaintiff in an action of this nature." *Senter v. Petheram*, 64 Misc. 294, 118 N. Y. Supp. 347, 348; *Larkin v. McNamee*, 109 App. Div. 884, 96 N. Y. Supp. 827.

**2926** n. 200. *Ottman v. Schenectady Co-Operative Realty Co.*, 119 App. Div. 736, 104 N. Y. Supp. 137. This Code provision is now Cons. Laws, c. 33, § 53.

**2927** n. 202. If the action is unnecessary, defendant is properly awarded costs. *Millard v. Breckwoldt*, 100 App. Div. 44, 48, 90 N. Y. Supp. 890.

**2928** n. 211. "Both parties to this litigation have been in error as to their alleged rights, and, in the exercise of the discretion to dispose of costs in an equity action, costs are not awarded to either party." *Harvey v. Beckman*, 64 Misc. 395, 118 N. Y. Supp. 602, 607.

**2929** n. 219. *Fitch v. Hay*, 112 App. Div. 736, 98 N. Y. Supp. 1090.

**2932** n. 237. Where one of the defendants defaults and verdict is recovered by the other, costs in favor of the latter rest in the discretion of the court. *Bruck v. Lambeck*, 63 Misc. 117, 116 N. Y. Supp. 784. Where judgment for costs is erroneously awarded in favor of a defendant answering separately, on the dismissal of the complaint as to him, the remedy is by an order striking from the judgment that part which awards costs. *Ljungquist v. Hartmetz*, 54 Misc. 87, 104 N. Y. Supp. 498.

**2932** n. 238. *Schuller v. Robison*, 139 App. Div. 97, 123 N. Y. Supp. 881. See *Hutchins v. Lavery*, 78 Misc. 518, 139 N. Y. Supp. 957.

**2932** n. 240. *Linn v. Nassau Electric R. Co.*, 142 N. Y. Supp. 552.

**2933** § 2096. While the statute authorizes the imposition of costs in a proceeding to punish for a civil contempt, there is no such authority in a case for criminal contempt, since the latter is a criminal proceeding and not a special proceeding such as defined by the Code. *People ex rel. Stearns v. Marr*, 181 N. Y. 463, 471, 74 N. E. 431.

**2933** n. 244. *Matter of Bradley*, 145 App. Div. 49, 129 N. Y. Supp. 450; *Matter of People of the State of New York*, 70 Misc. 72, 128 N. Y. Supp. 29. Proceeding under liquor tax law, for seizure of liquor, is a special proceeding in which costs should be allowed to the prevailing party. *Farley v. Sixteen Bottles of Champagne*, 153 App. Div. 502, 138 N. Y. Supp. 276.

**2934** n. 249. See also *In re Rapid Transit Com'rs*, 103 App. Div. 530, 93 N. Y. Supp. 262.

**2934** § 2097. Where a demurrer is brought on for hearing by a motion for judgment on the pleadings, only motion costs can be allowed. *Kramer v. Barth*, 79 Misc. 80, 139 N. Y. Supp. 341.

**2934** n. 253. *Finch v. Wells*, 66 Misc. 384, 123 N. Y. Supp. 667.

**2934** n. 254. *Mutual Life Ins. Co. v. Granniss*, 57 Misc. 174, 107 N. Y. Supp. 926.

**2935** n. 260. An ex parte application for an order directing the issuance of an execution against the wages of defendant, under § 1391 of the Code, is not a motion within § 3236 of the Code as to costs of motions. *Brodie v. O'Donnell*, 71 Misc. 530, 130 N. Y. Supp. 805.

**2936**. Costs should not be imposed on a moving party whose motion is denied, where the motion is not opposed

by the counsel who appear in behalf of the party against whom the application is made. *In re Collins' Estate*, 93 N. Y. Supp. 342.

**2939** n. 290. Does not apply to action by county against city where poor person has a settlement, to recover for support furnished. *Onondaga County v. Amsterdam*, No. 2, 139 App. Div. 883, 124 N. Y. Supp. 562.

**2940** § 2102. In condemnation proceedings, see *Dexter & Northern R. R. Co. v. Foster*, 142 App. Div. 240, 126 N. Y. Supp. 835. Where defendants united in interest, and one cannot be sued without joining the others, only one bill is allowable. *Underwood v. Schulz*, 130 N. Y. Supp. 158.

**2940** n. 307. *Kelly v. St. Michael's, etc., Church*, 148 App. Div. 767, 133 N. Y. Supp. 328. But see *Ingeman v. Snare & T. Co.*, 158 App. Div. 915, 143 N. Y. Supp. 840.

**2940** n. 308. *Dexter & Northern R. R. Co. v. Foster*, 142 App. Div. 240, 126 N. Y. Supp. 835.

**2941** n. 311. *Jacobs v. Feinstein*, 133 App. Div. 416, 117 N. Y. Supp. 823; *Rowe v. Granger*, 118 App. Div. 459, 103 N. Y. Supp. 439.

**2942**. Unsuccessful defendant, in action at law on single contract of insurance running to plaintiff, should not be compelled to pay two bills of costs, one to plaintiff and the other to intervening codefendants. *Reed v. Provident Saving Life Assur. Soc.*, 190 N. Y. 111, 82 N. E. 734. In an action to foreclose several mechanics' liens filed by different persons, it is improper to allow the owner separate bills of costs against unsuccessful lienors who filed separate liens, since only one bill of costs can be allowed to one party in such a case. *Woolf v. Schafer*, 103 App. Div. 567, 573, 93 N. Y. Supp. 184.

**2943** § 2105. Intervener who is not a party, and who appears merely to assist the court, is not liable. *Jackson v. Smith*, 154 App. Div. 883, 138 N. Y. Supp. 914.

**2943** n. 325. Neglect of party sought to be charged to

enter order granting his motion to be substituted as plaintiff cannot defeat recovery of costs. *Chambers v. Bacon*, 153 App. Div. 194, 138 N. Y. Supp. 337.

**2944.** In an action for breach of contract, a defendant, originally a partner of the plaintiff when the contract was made, and who was made defendant because he refused to join in the action, cannot be charged with costs recovered by the defendant, who was alleged to have made the breach of contract, because the plaintiff was not the transferee of the cause of action, and the defendant sought to be charged with costs did not procure the institution of the suit, and also because he was a party to the action, and it did not become his property by transfer. *Moore v. Vulcanite Portland Cement Co.*, 160 App. Div. 673.

**2944 n. 328.** This applies only to the costs accruing after the transfer. *Kessler v. Herklotz*, 132 App. Div. 278, 117 N. Y. Supp. 45.

**2945.** Where former owners of milk cans sold them to a corporation of which they became officers, and the corporation sues to recover the penalty for the unlawful detention of the cans, the former owners were not beneficially interested so as to be liable for costs. *Pierson v. Clark*, 116 App. Div. 519, 101 N. Y. Supp. 719.

**2945 n. 334.** See *Moore v. Vulcanite Portland Cement Co.*, 160 App. Div. 673.

**2948 n. 357.** Motion is proper mode of applying. *Chambers v. Bacon*, 153 App. Div. 194, 138 N. Y. Supp. 337. Costs may be recovered by action where the summary proceeding authorized by statute would not be an adequate and effective remedy. *Hiscock v. Tuck*, 122 App. Div. 116, 106 N. Y. Supp. 700. Order not discretionary. *Nelligan v. Groth*, 126 App. Div. 444, 110 N. Y. Supp. 619.

**2948 n. 360.** Application may be made either by a notice of motion or an order to show cause. *Chambers v. Bacon*, 153 App. Div. 194, 138 N. Y. Supp. 337.

**2950 n. 370.** State superintendent of banks is "a person expressly authorized by statute to sue or be sued." *Matter of Carnegie Trust Co.*, 161 App. Div. 280, 147 N. Y. Supp. 180. Judgment by defendant for costs as entitled to priority in payment, see *Matter of Friedlander*, 160 App. Div. 475, 145 N. Y. Supp. 679.

**2950 n. 378.** *Lakin v. Sutton*, 132 App. Div. 557, 116 N. Y. Supp. 820.

**2956 n. 409.** *Lightfoot v. Davis*, 112 N. Y. Supp. 289. See also *Gardner v. Pitcher*, 109 App. Div. 106, 95 N. Y. Supp. 678. Laws 1906, c. 60, amends section 1836 of the Code merely in matters of punctuation by striking out a semicolon, but does not seem to change its meaning. Sufficiency of certificate, see *Lightfoot v. Davis*, 112 N. Y. Supp. 289.

**2958 n. 425.** Failure to file consent gives right to costs although the claim is largely reduced by the judgment. *Persbacker v. Murphy*, 153 App. Div. 492, 138 N. Y. Supp. 537. Service of rejection of claim by mail does not double the time to file consent, so as to make an action brought before the double time a waiver of the right to costs. *Persbacker v. Murphy*, 153 App. Div. 492, 138 N. Y. Supp. 537.

**2959 n. 429.** *Demarest v. Smith*, 143 App. Div. 104, 127 N. Y. Supp. 659.

**2959 n. 430.** *Scheu v. Blum*, 119 App. Div. 825, 104 N. Y. Supp. 887.

**2959 § 2110.** On vacating order for examination of judgment debtor, costs cannot be imposed on attorney personally. *Matter of Baker v. Blum*, 65 Misc. 177, 119 N. Y. Supp. 554.

**2960 n. 442.** See *Hauser v. Herzog*, 141 App. Div. 522, 126 N. Y. Supp. 337.

**2961 § 2114.** Where a new trial is granted on motion, the result thereof being the same, plaintiff is entitled to costs and disbursements of both trials, although he consented

to the order for a new trial because he claimed the damages were inadequate. *Capozzi v. Bulkley*, 156 App. Div. 55, 114 N. Y. Supp. 117. On dismissal for failure to prosecute with all costs to date, after reversal on appeal, costs after notice of trial, a trial fee and term fees are properly taxed. *Bowery Bank of New York v. Hart*, 132 N. Y. Supp. 1119.

2962 n. 456. Rule applied to proceedings to revoke liquor license. *Matter of Young*, 66 Misc. 216, 122 N. Y. Supp. 1116.

2962 § 2116. This item is taxable in special proceedings as well as in actions. *Matter of Young*, 66 Misc. 216, 122 N. Y. Supp. 1116. In an action in tort the costs before notice of trial should be taxed at twenty-five dollars; but where the allegations of the complaint make it doubtful whether the action is *ex delicto* or *ex contractu*, it should be construed as *ex contractu* and the costs taxed at fifteen dollars. Allegations of conversion may be disregarded as surplusage in an action for money had and received. *Lange v. Schile*, 111 App. Div. 613, 98 N. Y. Supp. 81.

2963 n. 458. See *Girbekian v. Costikyan*, 126 App. Div. 812, 111 N. Y. Supp. 243.

2963 n. 461. *De Turckheim v. Thomas*, 113 App. Div. 123, 99 N. Y. Supp. 104.

2964 n. 466. Where demurrer is brought on by motion for judgment on the pleadings, this item is not taxable. *Kramer v. Barth*, 79 Misc. 80, 139 N. Y. Supp. 341.

2964 n. 469. Note of issue necessary. *Rinaldo v. Cowen*, 122 N. Y. Supp. 1074. Not allowable on granting motion for judgment on the pleadings. *Singer Mfg. Co. v. Granite Spring Water Co.*, 67 Misc. 575, 124 N. Y. Supp. 750.

2965 n. 475. *Norton v. Erie R. Co.*, 83 Misc. 159, 144 N. Y. Supp. 656. Can only be taxed once. *Chism v. Smith*, 130 N. Y. Supp. 881. Upon a new trial after reversal, the prevailing party, who is entitled to costs of both trials, cannot tax two items of costs, before and after notice of

trial. The case of Bank of Mobile Insurance Co., 8 N. Y. Civ. Proc. R. 212, approved in *Seifter v. Brooklyn Heights R. Co.*, 53 App. Div. 443, 65 N. Y. Supp. 1123, is authority for the proposition that costs before and after notice of trial are not taxable twice under any circumstances; and while the contrary was held in *Gilroy v. Badger*, 28 Misc. 143, 58 N. Y. Supp. 1106, this last case was treated as overruled by the *Seifter* Case in *Hakonson v. Metropolitan St. R. Co.*, 40 Misc. 182, 81 N. Y. Supp. 662. So held in *Berrent v. Simpson*, 115 N. Y. Supp. 693 [overruling on rehearing 113 N. Y. Supp. 1065].

**2965** n. 476. Two fees allowed where case is partially tried on short cause calendar and then tried on regular calendar. *Libman v. Cohen*, 3 Current Ct. Dec. 6.

**2966** n. 482. *Rose v. Swarthout*, 73 Misc. 583, 133 N. Y. Supp. 557.

**2966** § 2124. Trial fee not allowable on granting plaintiff's motion for a judgment on the pleadings where demurrer has been interposed. *Singer Mfg. Co. v. Granite Spring Water Co.*, 67 Misc. 575, 124 N. Y. Supp. 750.

**2967** § 2125. Granting of extra allowance as condition of granting postponement of trial held not to preclude taxing a trial fee. *Booth v. Kerbaugh*, 82 Misc. 57, 143 N. Y. Supp. 624.

**2967** n. 489. An interlocutory reference is not a "trial" within the Code provision allowing the taxing of \$30 costs for the trial of an issue of fact. *Boissevain v. Pope*, 64 Misc. 292, 118 N. Y. Supp. 577. Trial fee is taxable for a trial where plaintiff serves an amended complaint on the trial and defendant claims twenty days to answer it. *Chism v. Smith*, 130 N. Y. Supp. 881. Though verdict for plaintiff on first trial was set aside plaintiff is entitled to two trial fees where successful on the second trial. *R. M. Gilmour Mfg. Co. v. Stettler*, 109 N. Y. Supp. 667. Submission or argument of an appeal is not a trial, under Code provision

relating to fees of clerk. *Rogowski v. Brill*, 74 Misc. 472, 132 N. Y. Supp. 370, 3 Civ. Pro. Rep. (N. S.) 75.

**2968** n. 498. *Browning v. Brokaw*, 114 App. Div. 104, 99 N. Y. Supp. 599; *De Turekheim v. Thomas*, 113 App. Div. 123, 99 N. Y. Supp. 104. Costs before notice of trial are not taxable. *Penfield v. New York*, 53 Misc. 39, 102 N. Y. Supp. 784; *De Turekheim v. Thomas*, 113 App. Div. 123, 99 N. Y. Supp. 104; *Chase v. Drake*, 92 App. Div. 613, 86 N. Y. Supp. 1131; *Hill v. Muller*, 53 Misc. 262, 103 N. Y. Supp. 96.

**2969** n. 511. A trial fee is allowable for each trial although the first reference was terminated because of delay of the referee in reporting. *Dame v. Maynard*, 139 App. Div. 385, 124 N. Y. Supp. 17.

**2969** n. 513. Two trial fees where case is partially tried on short cause calendar and then tried on regular calendar. *Libman v. Cohen*, 3 Current Ct. Dec. 6.

**2971** § 2127. On appeal to Appellate Division from judgment of County Court on appeal from a justice court, see *Brick v. Favilla*, 55 Misc. 38, 106 N. Y. Supp. 188.

**2972** n. 525. *Koeppel v. Koeppel*, 50 Misc. 619, 98 N. Y. Supp. 215.

**2972** § 2130. This applies although successful party consented to new trial, claiming that his damages were inadequate. *Cafozzi v. Bulkley*, 156 App. Div. 55, 141 N. Y. Supp. 117.

**2974** n. 542. Not before. *Kennedy v. Jarvis*, 126 App. Div. 551, 110 N. Y. Supp. 894.

**2975** n. 555. Where order of reference is agreed on before the opening of court, and the order is made before the case is called, a term fee cannot be taxed. *Dame v. Maynard*, 139 App. Div. 385, 124 N. Y. Supp. 17.

**2976** n. 561. *Mossein v. Empire State Surety Co.*, 117 App. Div. 782, 102 N. Y. Supp. 1012. See also *Fuller Buggy Co. v. Waldron*, 49 Misc. 278, 97 N. Y. Supp. 730.



**2977** n. 568. *Grant v. Pratt & Lambert*, 110 App. Div. 149, 97 N. Y. Supp. 38.

**2977** § 2134. Disbursements must be reasonable. *Valk v. Erie R. Co.*, 128 App. Div. 470, 112 N. Y. Supp. 792.

**2977** n. 570. This is so where, on a reference, a stipulation is entered into fixing referee's and stenographer's fees and providing that they shall be taxed "as a disbursement in the action." *Megrue v. Megrue*, 160 App. Div. 817, 144 N. Y. Supp. 957. An award of "costs" on appeal from a surrogate's decree includes disbursements. *In re Perry*, 131 App. Div. 284, 115 N. Y. Supp. 744.

**2978** n. 577. So a premium paid to a surety company for an undertaking as security for costs is not taxable. *Louisville Lumber Co. v. Smith*, 154 App. Div. 386, 139 N. Y. Supp. 357.

**2978** § 2135. Agreement to compensate witness residing in the state, for testifying merely as to facts, in excess of the statutory fees, is illegal. *Clifford v. Hughes*, 139 App. Div. 730, 124 N. Y. Supp. 478. Fees of witnesses who are special excise agents may be taxed. *Cullinan v. Federal Union Surety Co.*, 51 Misc. 643, 100 N. Y. Supp. 515.

**2979** n. 587. *Chism v. Smith*, 130 N. Y. Supp. 881. Not taxable where witnesses subpoenaed to rebut anticipated evidence which was actually offered but excluded upon objection. *Lalla v. Bulkley*, 156 App. Div. 57, 141 N. Y. Supp. 118.

**2981** n. 593. *Fuller Buggy Co. v. Waldron*, 49 Misc. 278, 97 N. Y. Supp. 730. But witness' fees of attorney may be taxed where services performed by attorney could have been performed by one not an attorney and he did not sustain the relation of attorney in the action. *Kennedy v. Jarvis*, 126 App. Div. 551, 110 N. Y. Supp. 894.

**2982** n. 607. Where witnesses travel on passes and demanded no mileage, travel fees are not allowable. *Valk v. Erie R. Co.*, 128 App. Div. 470, 112 N. Y. Supp. 792. If witness goes back and forth daily from his residence to his

place of business, he is entitled to mileage from his residence. *Smith v. Hutton*, 134 App. Div. 445, 119 N. Y. Supp. 194. Mileage must be figured from his residence which must be either his permanent or temporary place of abode. *Smith v. Hutton*, 134 App. Div. 445, 119 N. Y. Supp. 194. Mileage can be taxed for only one attendance. *O'Rourke v. Degnon Realty, etc., Co.*, 139 App. Div. 695, 124 N. Y. Supp. 364.

2983 n. 611. And see *Smith v. Hutton*, 63 Misc. 530, 117 N. Y. Supp. 374.

2983 n. 618. "When a witness is duly subpoenaed to attend court it is his duty, unless relieved by special application to the court on the ground that there has been an abuse of process in holding him in attendance at the court, to attend from day to day on due payment of the per diem allowance prescribed by the statute, and that it is not necessary, in the case of the usual recess of the court over Sunday or a legal holiday, to subpoena him over and pay another mileage. Of course, if after a witness is duly in attendance the case in which he is subpoenaed should be postponed for some time or the court should be adjourned for a longer period than the ordinary recess, the court would not require the witness to remain in attendance on payment of a per diem fee when it was known that the case could not be moved for trial or that the court was not to be in session." *Booth v. Kerbaugh*, 82 Misc. 57, 143 N. Y. Supp. 624.

2984 n. 621. *Tiffany v. Kellogg Iron Works*, 59 Misc. 113, 109 N. Y. Supp. 754.

2985 n. 629. When allowance improper, see *Valk v. Erie R. Co.*, 128 App. Div. 470, 112 N. Y. Supp. 792.

2985 § 2140. In certiorari proceedings to review tax assessments, see *People ex rel. New York, C. & H. R. R. Co., v. Tax Com'rs*, 80 Misc. 557, 142 N. Y. Supp. 583.

2986. Where on a motion for a new trial there is a dispute as to the testimony of one of the witnesses, and the court directs one of the counsel to furnish the testimony, the

stenographer's fee for transcribing such evidence is part of the taxable costs. But where the stenographer furnishes to the party all the minutes of the trial the bill for the other testimony should not be included. *Vibbard v. Kinser Construction Co.*, 145 App. Div. 673, 130 N. Y. Supp. 837. Charges for expediting minutes furnished during the trial cannot be taxed. *Pratt v. Clark*, 124 App. Div. 248, 108 N. Y. Supp. 734.

2986 n. 637. *Pringle v. Dean*, 128 N. Y. Supp. 1051; *Price v. Western Distillery Co.*, 114 N. Y. Supp. 714; *Bremer v. Manhattan R. Co.*, 51 Misc. 96, 99 N. Y. Supp. 746; *Starkweather v. Sundstrom*, 113 App. Div. 401, 98 N. Y. Supp. 1086 (holding it immaterial that the respondent did not first request the loan of the appellant's copy). Cannot be taxed where opposing party offers use of his copy at the time of serving his proposed case. *Adams Laundry Machinery Co. v. Prunier*, 157 App. Div. 153, 141 N. Y. Supp. 803; *Pringle v. Dean*, 128 N. Y. Supp. 1051. Expense of employing stenographer to transcribe minutes of deceased official stenographer is taxable. *Griffin v. Flank*, 79 Misc. 415, 140 N. Y. Supp. 122.

2986 n. 638. *Contra*, *R. M. Gilmour Mfg. Co. v. Stetler*, 109 N. Y. Supp. 667.

2986 n. 641. So where minutes of the trial were ordered and received by defendant from day to day on the trial, he cannot tax the cost for use in preparing amendments to a case on appeal. *Long Island Contracting, etc., Co. v. New York*, 142 App. Div. 1, 126 N. Y. Supp. 429. It is held, however, that it is no objection that the minutes were ordered during the progress of the trial, and used upon it. *Pratt v. Clark*, 124 App. Div. 248, 108 N. Y. Supp. 734.

2987 n. 644. *Baff v. Elias*, 152 App. Div. 226, 136 N. Y. Supp. 563. But if stipulation is made it survives an election and notification to end the reference. *Hertzberg v. Elvidge*, 80 Misc. 290, 142 N. Y. Supp. 211.

**2988** § 2144. Fees paid for an abstract of title in another state are a taxable disbursement. *Rose v. Swarthout*, 73 Misc. 583, 133 N. Y. Supp. 557. Express charges on papers may be allowed. *Chism v. Smith*, 130 N. Y. Supp. 881.

**2989** n. 658. Disbursements can be allowed only for the kind of searches specifically provided for herein. *Friedman v. Borchardt*, 161 App. Div. 672.

**2989** § 2145. Cost of printing summons and complaint may be allowed where large number of defendants. *Rinaldo v. Cowen*, 122 N. Y. Supp. 1074. Costs of blue prints of exhibits inserted in the appeal book may be taxed. *Chism v. Smith*, 130 N. Y. Supp. 881.

**2990** § 2147. Where the necessity for personal service is not shown, disbursements for serving personally the answer and an order upon the opposing attorney should not be allowed. *Fuller Buggy Co. v. Waldron*, 49 Misc. 278, 97 N. Y. Supp. 730.

**2990** § 2148. Under Municipal Court Act, see *Scherl v. Flam*, 136 App. Div. 753, 121 N. Y. Supp. 522.

**2994** § 2154. Dower suits not included. *Rinaldo v. Cowen*, 122 N. Y. Supp. 1074. An easement is "real property" within subd. 4. *Furniss v. Fogarty*, 63 Misc. 527, 117 N. Y. Supp. 385.

**2995** n. 706. Contra, *McLaughlin v. Mendelson*, 160 App. Div. 37, 144 N. Y. Supp. 1073.

**2996** n. 709. See also *Friedman v. Borchardt*, 161 App. Div. 672.

**2997** § 2158. May be granted to plaintiff although defendant offered no evidence at the trial. *Clark v. Gilmore*, 149 App. Div. 445, 133 N. Y. Supp. 1047. Not allowed in eminent domain proceedings. *Erie & J. R. Co. v. Brown*, 123 App. Div. 655, 107 N. Y. Supp. 989. An order affirming the report of a referee and directing further proceedings by the receiver in the action, being an order made on a motion in the action, cannot award a sum to the attorney for the re-

ceiver as an extra allowance in lieu of costs. *Adams v. Elwood*, 104 App. Div. 138, 93 N. Y. Supp. 327. In action to compel a determination of a claim to real property, see *Renwick v. Weeden*, 135 App. Div. 695, 120 N. Y. Supp. 532.

**2997** n. 715. See *Lightfoot v. Davis*, 112 N. Y. Supp. 289. Cannot be granted where costs of trial are not awarded. *Barnes v. Midland Ry. T. Co.*, 161 App. Div. 621, 147 N. Y. Supp. 1097.

**2998** n. 720. *American Fruit Product Co. v. Ward*, 113 App. Div. 319, 99 N. Y. Supp. 717.

**2998** § 2160. Expense and annoyance sustained in a criminal proceeding cannot be considered. *Metcalf v. Klaw*, 130 App. Div. 502, 114 N. Y. Supp. 955.

**2998** n. 721. See *General Ry. Signal Co. v. Cade*, 122 App. Div. 106, 106 N. Y. Supp. 729.

**3000** n. 736. See *Campbell v. Emslie*, 188 N. Y. 509. Allowance may be made to defendant in partition, and is not to be paid solely out of defendant's interest. *Story v. Lutkins*, 77 Misc. 17, 135 N. Y. Supp. 118.

**3001** n. 743. Propriety of allowances in action to construe will, see *Rothschild v. Goldenberg*, 103 App. Div. 235, 242.

**3001** n. 745. *MacFarlane v. Brower*, 63 Misc. 183, 116 N. Y. Supp. 34. See also *Walbridge v. Walbridge*, 133 App. Div. 33, 116 N. Y. Supp. 239; *Strong v. Gambier*, 155 App. Div. 294, 140 N. Y. Supp. 410.

**3002** § 2166. In action to reform written instrument, see *Baird v. Erie R. R. Co.*, 148 App. Div. 452, 132 N. Y. Supp. 971. The "case" may be a difficult and extraordinary one although no difficult questions of law are involved, where there are difficult questions of fact. *American Fruit Product Co. v. Ward*, 113 App. Div. 319, 99 N. Y. Supp. 717.

**3002** n. 750. See *Boocock v. Wood*, 128 App. Div. 645, 113 N. Y. Supp. 46.

**3002 n. 752.** Allowance held proper. *Ryan v. New York*, 159 App. Div. 116.

**3002 n. 755.** Followed in *Campbell v. Emslie*, 188 N. Y. 509. See also *Miller v. Twiname*, 129 App. Div. 623, 114 N. Y. Supp. 151.

**3003.** "The questions of fact were both difficult and extraordinary, involving the careful research and examination of ancient documents, records and histories of the seventeenth century and the production by plaintiff of more than seventy exhibits, which of itself, irrespective of the questions of law involved, is sufficient to justify an allowance." *North Hempstead v. Oelsner*, 148 App. Div. 779, 780, 133 N. Y. Supp. 319. The fact that an expensive and elaborate investigation is necessary in a libel suit to secure evidence in justification, while it may indicate that the defense is difficult, does not make the case a difficult one. *Venner v. Belmont*, 158 App. Div. 899, 143 N. Y. Supp. 161. That it takes several days to try a case does not authorize an allowance. *Allen-Kingston Motor Car Co. v. Consolidated Nat. Bank*, 145 App. Div. 294, 129 N. Y. Supp. 1070. Where the answer admits the right of plaintiff to recover the amount demanded in the complaint, but sets up a counterclaim under which the defendant recovers less than the amount admitted to be due plaintiff, the fact that the case is a difficult and extraordinary one does not authorize the granting of an additional allowance to plaintiff, where the difficulty arose in regard to the counterclaim as to which defendant prevailed. *Huber v. Clark*, 105 App. Div. 127, 93 N. Y. Supp. 1090. Controversy between executor and legatee as to deduction of debt from legacy held not difficult and extraordinary. *Leask v. McCarthy*, 147 App. Div. 796, 132 N. Y. Supp. 92.

**3003 n. 756.** *Frey v. New York Cent. & H. R. R. Co.*, 114 App. Div. 623, 100 N. Y. Supp. 229. See *Cooper v. New York, L. & W. R. Co.*, 122 App. Div. 128, 106 N. Y. Supp. 611.

**3003** n. 758. *Storrs v. Northern Pacific Ry. Co.*, 148 App. Div. 403, 132 N. Y. Supp. 954; *Finan v. New York Cent. & H. R. R. Co.*, 111 App. Div. 383, 97 N. Y. Supp. 859; *Walker v. Newton Falls Paper Co.*, 111 App. Div. 19, 97 N. Y. Supp. 521; *Leonard v. Union R. Co.*, 98 App. Div. 204, 90 N. Y. Supp. 574. A case is not extraordinary because tried four times. *Vaughn v. Glens Falls Portland Cement Co.*, 59 Misc. 230, 112 N. Y. Supp. 240. Action for personal injury from negligence may be difficult and extraordinary. *Colligan v. New York City*, 83 Misc. 573, 144 N. Y. Supp. 1049.

**3005** n. 778. *Matter of State of New York*, 152 App. Div. 633, 137 N. Y. Supp. 485; *Syracuse Savings Bank v. Stokes*, 71 Misc. 508, 130 N. Y. Supp. 596; *In re Tarrytown, W. P. & M. R. Co.*, 133 App. Div. 297, 117 N. Y. Supp. 695.

**3005** n. 781. But the fact that there was no trial of the issues is an important fact as bearing against the contention that the case was difficult and extraordinary. *Campbell v. Emslie*, 188 N. Y. 509, 81 N. E. 458.

**3005** n. 782. In mortgage foreclosure cases, it is not necessary that a defense be interposed to authorize the extra allowance. *Badger v. Johnston*, 106 App. Div. 237, 94 N. Y. Supp. 421.

**3006** n. 787. See also *Campbell v. Emslie*, 188 N. Y. 509.

**3006** n. 791. But such condition should not be imposed where the action was not difficult and extraordinary, and where all that had been done was to interpose an answer, move to vacate a temporary injunction which had been granted, and argue the appeal from the order denying the motion. *New York v. A. T. Stewart Realty Co.*, 113 App. Div. 50, 98 N. Y. Supp. 889. When improper, see *Schlegel v. Roman Catholic Church*, 124 App. Div. 502, 108 N. Y. Supp. 955.

**3008** § 2168. If allowance is denied by lower court because there is no basis for computation, but Appellate Division

modifies the judgment so as to establish such a basis, it will grant an allowance. *Central Trust Co. v. West India Imp. Co.*, 144 App. Div. 560, 129 N. Y. Supp. 730. In judgment creditor's action against insolvent safe deposit company, basis is amount plaintiff is entitled to recover from the stockholders. *Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786. The subject-matter involved on certiorari to review an assessment is the tax involved and not the assessment. *People v. Hall*, 130 App. Div. 360, 114 N. Y. Supp. 511.

**3011** n. 825. See also *J. J. Newman Lumber Co. v. Wemple*, 56 Misc. 182, 107 N. Y. Supp. 327.

**3013** n. 837. *Kitching v. Brown* is reported in 180 N. Y. 414. See *City of New York v. A. T. Stewart Realty Co.*, 113 App. Div. 5, 980 N. Y. Supp. 889.

**3013** n. 846. But see *Henderson Estate Co. v. Carroll Electric Co.*, 113 App. Div. 775, 99 N. Y. Supp. 365.

**3017** n. 873. See also *Weidenfeld v. Byrne*, 113 App. Div. 410, 99 N. Y. Supp. 271.

**3018** n. 881. *Contra*, *Walter v. Frank*, 118 N. Y. Supp. 268; *Walter v. Walter*, 60 Misc. 570, 113 N. Y. Supp. 897; *Walter v. Frank*, 60 Misc. 383, 118 N. Y. Supp. 268 [aff. without opinion in 133 App. Div. 893, 118 N. Y. Supp. 268].

**3018** n. 888. *MacFarlane v. Brower*, 63 Misc. 183, 116 N. Y. Supp. 34. And for the purpose of fixing the allowance to any defendant, the value of his interest is the basis. *Warren v. Warren*, 203 N. Y. 250, 96 N. E. 417.

**3020** n. 896. *Warren v. Warren*, 203 N. Y. 250, 96 N. E. 417; *Van Meter v. Kelly*, 137 App. Div. 455, 121 N. Y. Supp. 874; *MacFarlane v. Brower*, 63 Misc. 183, 116 N. Y. Supp. 34. If total allowances exceed five per cent., each will be reducible pro rata. *Van Meter v. Kelly*, 137 App. Div. 455, 121 N. Y. Supp. 874.

**3020** n. 897. *Matter of Simmons*, 208 N. Y. 69, 101 N. E. 704, 71 Misc. 152, 128 N. Y. Supp. 724. Applies only to



allowances on one side. *Warren v. Warren*, 203 N. Y. 250, 96 N. E. 417.

**3020** n. 899. It must be shown that the action was difficult and extraordinary. *Riesgo v. Glengariffe Realty Co.*, 114 App. Div. 172, 99 N. Y. Supp. 592.

**3021** § 2170. If granting of allowance is discretionary, court may afterwards revoke the allowance. *Warren v. Warren*, 203 N. Y. 250, 96 N. E. 417.

**3022** n. 919. But where the judgment as entered contains a vacant space where the costs can be inserted, it is within the power of the court to amend the judgment by permitting, in addition to the regular costs, an extra allowance. *Bowers v. Male*, 102 App. Div. 609, 92 N. Y. Supp. 183.

**3023** n. 920. But question cannot be passed on until all the issues in the action have been settled. *Clarke v. Gilmore*, 149 App. Div. 445, 133 N. Y. Supp. 1047.

**3023** nn. 927-929. In *Badger v. Johnston*, 106 App. Div. 237, 94 N. Y. Supp. 421, a notice in a mortgage foreclosure suit, on default, for the relief demanded in the complaint, was held broad enough to authorize an extra allowance, without further notice.

**3024**. In the absence of objection or exception at the time of the allowance, the Appellate Division will not, it seems, interfere therewith, especially where it is supported by equitable reasons. *Schiff v. Tamor*, 93 N. Y. Supp. 853. Order. It is sufficient that the order appear on the clerk's minutes without a formal order signed by the trial judge. *Harris v. Baltimore Machine & Elevator Co.*, 112 App. Div. 389, 98 N. Y. Supp. 440.

**3025** n. 938. *Campbell v. Emslie*, 188 N. Y. 509. Contra, *Harris v. Baltimore Machine & Elevator Co.*, 112 App. Div. 389, 98 N. Y. Supp. 440.

**3025** n. 940. See also ante, **3003** n. 761. *Town of North Hempstead v. Oelsner*, 148 App. Div. 779, 133 N. Y. Supp. 319. Especially where record is insufficient. *Van Meter v.*

Kelly, 137 App. Div. 455, 121 N. Y. Supp. 874. No discretion where parties consent. Woodbury v. Woodbury, 144 App. Div. 680, 129 N. Y. Supp. 686.

3025 n. 941. Campbell v. Emslie, 188 N. Y. 509, 81 N. E. 458; Kitching v. Brown is reported in 180 N. Y. 414.

3026 n. 947. Provision applies to cases in which costs are to be inserted in a judgment or final order. Carter v. Builders' Constr. Co., 134 App. Div. 553, 119 N. Y. Supp. 670.

3033. After the clerk has taxed the costs, he has no authority, on his own initiative, to strike any item from the bill. La Rosa v. Wilner, 54 Misc. 574, 104 N. Y. Supp. 952.

3033 n. 994. Plaintiff may move the court for an order limiting the defendants to one bill of costs on the ground that the separate defenses were interposed unnecessarily and collusively, and that the practice adopted was unjust and a fraud upon the law, but the clerk has no right to determine this question, and can exercise no judicial power in granting or refusing the costs of the action to any party. Kaplan v. Olsen, 64 Misc. 437, 118 N. Y. Supp. 634, 635.

3034 n. 999. Talcott v. Wabash R. Co., is officially reported in 99 App. Div. 239.

3034 § 2177. Where the court at Special Term has passed upon the reasonableness of witness' fees charged in a bill of costs it is not required to order a retaxation although the clerk may have determined the amount under the wrong section of the Code of Civil Procedure. Vibbard v. Kinser Construction Co., 145 App. Div. 673, 130 N. Y. Supp. 837. Party not appearing before the taxing officer may move to review. Dame v. Maynard, 139 App. Div. 385, 124 N. Y. Supp. 17. Failure to assert the total invalidity of a taxation before the taxing officer does not affect the right of a party to move to vacate the taxation. Hill v. Kann, 50 Misc. 360, 98 N. Y. Supp. 682.

**3035 n. 1005.** Nor for correcting the judgment. *Auerbach v. Phelps*, 3 Current Ct. Dec. 110.

**3035 n. 1012.** An excusable default in not attending a retaxation may be relieved against hereunder. *Dame v. Maynard*, 139 App. Div. 385, 124 N. Y. Supp. 17.

**3036 n. 1020.** *Levittas v. Hart*, 64 Misc. 36, 117 N. Y. Supp. 1027; *La Rosa v. Wilner*, 54 Misc. 574, 104 N. Y. Supp. 952; *Crotty v. De Dion-Bouton Motorette Co.*, 102 App. Div. 405, 92 N. Y. Supp. 619; *Chism v. Smith*, 130 N. Y. Supp. 881.

**3036 n. 1021.** *Leyden v. Brooklyn Heights R. Co.*, 122 App. Div. 383, 106 N. Y. Supp. 769; *Fourteenth Street Bank v. Strauss*, 54 Misc. 588, 104 N. Y. Supp. 956; *La Rosa v. Wilner*, 54 Misc. 574, 104 N. Y. Supp. 952. But where clerk had no right to tax costs in favor of the plaintiff, the failure to object generally does not preclude a determination on retaxation of the merits of plaintiff's right to costs. *Leyden v. Brooklyn Heights R. Co.*, 122 App. Div. 383, 106 N. Y. Supp. 769.

**3037.** Taxing amounts paid for taking depositions and for witness fees will not be interfered with where plaintiff's affidavit as to the amount paid is not contradicted. *Rose v. Swarthout*, 73 Misc. 583, 133 N. Y. Supp. 557.

**3039 n. 1040.** *Ost v. Salmanowitz*, 54 Misc. 547, 104 N. Y. Supp. 849. See also *Matter of Bradley*, 145 App. Div. 49, 129 N. Y. Supp. 450.

**3039 § 2179.** Awards of costs are not judgments and hence not a lien on the debtor's real estate. *Clinton v. South Shore Natural Gas & Fuel Co.*, 61 Misc. 339, 113 N. Y. Supp. 289. Payment from fund, see *Matter of Sohmer*, 156 App. Div. 781, 141 N. Y. Supp. 740.

**3040 n. 1050.** Costs upon a motion, not disposing of the merits of a cause, even though awarded by an order of the Appellate Division, are deemed interlocutory and are not enforceable against real property or by supplementary pro-

ceedings. *Matter of Bernard v. Cowen*, 82 Misc. 384, 143 N. Y. Supp. 757.

**3040** n. 1052. *Matter of Banning*, 108 App. Div. 12, 95 N. Y. Supp. 467. This Code provision is now Cons. Laws, c. 6, § 20.

**3041** n. 1054. *Losaw v. Smith*, 109 App. Div. 754, 96 N. Y. Supp. 191.

**3041** n. 1057. See *In re Stoddard*, 128 App. Div. 759, 113 N. Y. Supp. 157.

**3041** § 2183. Costs awarded against an administrator personally on his accounting cannot be enforced by contempt proceedings. *Matter of Banning*, 108 App. Div. 12, 95 N. Y. Supp. 467. Section 2268 of the Code is now Cons. Laws, c. 30, § 756.

**3041** n. 1059. *Obermeyer & Liebman v. Adisky*, 123 App. Div. 272, 107 N. Y. Supp. 949. Costs of reference of a motion. *Davidson v. Unger*, 139 N. Y. Supp. 157.

**3042** n. 1061. *Mandel v. Mandel*, 3 Current Ct. Dec. 47.

**3043** n. 1070. See *Donegan & Swift v. Patterson*, 129 App. Div. 349, 113 N. Y. Supp. 830.

**3044** n. 1073. But if general costs of action have been taxed in an entered judgment, motion costs cannot be set off. *Geneva Mineral Springs Co. v. Steel*, 81 Misc. 416, 143 N. Y. Supp. 331.

**3045** § 2189. Recovery back of excess of costs paid to attorney, see *One Hundred & Thirty-fourth Street Co. v. Wells*, 80 Misc. 215, 140 N. Y. Supp. 1051.

## CHAPTER II

## FEES

**3046** § 2191. Subdivision 4 of section 3307 is amended by Laws 1907, c. 253, by adding the following sentence: "No sheriff who receives an annual salary in whole or in part for his services shall be entitled to the fees provided by this subdivision, and in all counties where the sheriff receives such annual salary, the clerk shall place all causes upon the calendar for trial without the payment or collection of any fees therefor." Fees of unofficial stenographer employed by referee, see *Eckstein v. Schleimer*, 62 Misc. 635, 116 N. Y. Supp. 7.

**3047** n. 3. These Code provisions are now Cons. Laws, c. 30, § 252, and c. 47, § 67.

**3047** § 2193. Parties are jointly liable for fees of unofficial stenographer where parties stipulate that such fees shall be taxed as costs. *Finch v. Wells*, 66 Misc. 384, 123 N. Y. Supp. 667 [overruling in effect *Eckstein v. Schleimer*, 62 Misc. 635]. Laws 1908, c. 379, amends the statute in regard to official referees in the first department by fixing their compensation at a sum equal to the actual compensation paid to justices of the Supreme Court by the county of New York and provides that such referees shall not charge or receive any fee or compensation from the parties to the action, but may charge them with any disbursements provided the same is allowed by the court, and provides that if the services of a stenographer are required, such stenographer shall be selected by the referee from the official stenographers of the Supreme Court, and the parties to the action shall not be required to pay any of the fees of such stenographer for taking the testimony or furnishing one copy to the referee. By agreement fees may be payable only out of estate of deceased person. *Bottome v. Neeley*, 124 App. Div. 600, 109 N. Y.

Supp. 120. A referee may sue the prevailing party for his fees without filing or delivering a report where the parties terminated the action by stipulation and entered judgment without the knowledge or consent of the referee. *Keeler v. Bell*, 48 Misc. 427, 95 N. Y. Supp. 841. It is well settled that all the parties to an action (and the same rule applies to a special proceeding) are liable for the fees of a referee, even including those parties, if any, who objected to the appointment of a referee. And the same rule applies to the fees of an unofficial stenographer employed with the consent and acquiescence of the parties. See post, 3049 n. 26.

3048. Construction of agreement as to referee's fees in surrogate proceeding, see *Albert v. Miller*, 85 Misc. 16, 147 N. Y. Supp. 50.

3048 n. 10. This part of the statute does not apply to references in receivership proceedings. *People v. Bank of Staten Island*, 132 App. Div. 589, 116 N. Y. Supp. 827. Agreement that fees shall be \$10 an hour for each sitting excludes right to statutory fee when not sitting. *Morgenthau v. Carlin*, 132 App. Div. 361, 116 N. Y. Supp. 723. Rate agreed on for trial does not cover services in settlement of case. *Butterly v. Deering*, 69 Misc. 75, 125 N. Y. Supp. 832.

3048 n. 11. So is a stipulation that the referee "may charge and be paid a reasonable compensation for the services performed." *New York Mut. Sav. & L. Ass'n v. Westchester Fire Ins. Co.*, 98 App. Div. 285, 90 N. Y. Supp. 710.

3048 n. 14. *People v. Bank of Staten Island*, 132 App. Div. 589, 116 N. Y. Supp. 827.

3048 n. 17. Not entitled for days spent going to and returning from place of hearing. *People v. Bank of Staten Island*, 70 Misc. 637, 127 N. Y. Supp. 905.

3049 n. 19. *Keeler v. Bell*, 48 Misc. 427, 95 N. Y. Supp. 841.

3049 n. 26. Either party is responsible for the fees of

referee and stenographer where not individually parties in the surrogate's proceeding in which the reference was ordered. *Bottome v. Neely*, 54 Misc. 258, 104 N. Y. Supp. 429. Either party is responsible for the fees. *Keeler v. Bell*, 48 Misc. 427, 95 N. Y. Supp. 841. All the parties to an action or special proceeding are liable for the fees of a referee or those of an unofficial stenographer employed with the consent and acquiescence of the parties. *Bottome v. Alberst*, 47 Misc. 665, 94 N. Y. Supp. 348.

**3049** n. 27. *Carter v. Builders' Const. Co.*, 130 App. Div. 609, 115 N. Y. Supp. 339.

## PART XIII

### ENFORCEMENT OF JUDGMENTS AND ORDERS

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#### CHAPTER I

##### EXECUTION AGAINST PROPERTY

**3062.** See also **338.** Failure to pay money as directed by the decree in a suit for specific performance cannot be enforced by contempt proceedings but only by execution. *Weissenburger v. Williams*, 81 Misc. 397, 142 N. Y. Supp. 1027. Mandatory injunction can be enforced only as provided for herein. *Mills v. Leland*, 156 App. Div. 597, 141 N. Y. Supp. 725. An interlocutory judgment which, *inter alia*, directs the recovery of money is not enforceable by contempt proceedings. *Potter v. Rossiter*, 109 App. Div. 35, 95 N. Y. Supp. 1036. Payment of funds in the hands of a bank, as ordered by a judgment in an action to which the bank was not a party, cannot be summarily compelled by the successful party to the judgment by an order after judgment. *Silberman v. Scher*, 154 App. Div. 190, 138 N. Y. Supp. 1002.

**3063.** An executor who has been imprisoned for contempt in failing to pay over moneys pursuant to a final decree entered on his accounting, may be released from custody under section 775 of the Judiciary Law, where it appears that he is in a serious physical condition, and is unable to pay the fine imposed. But such release should be granted with leave to renew the application to punish for contempt, if the



moving party can subsequently establish a change in the executor's condition and ability to pay. *Matter of Scheuer*, 161 App. Div. 528.

**3068** n. 66. *Guiterman v. Coutant*, 59 Misc. 23, 111 N. Y. Supp. 1081. Second execution may be issued after lapse of five years by personal representatives. *Guiterman v. Coutant*, 128 App. Div. 452, 112 N. Y. Supp. 900.

**3068** § 2209. Application for leave to issue execution may be made at any time within twenty years after the docketing of the judgment as distinguished from its rendition. *Belfer v. Ludlow*, 143 App. Div. 147, 127 N. Y. Supp. 623.

**3069** n. 70. Where judgment creditor issued an execution within five years, his executors are entitled to a second execution without leave. *Guiterman v. Coutant*, 59 Misc. 447, 111 N. Y. Supp. 19. Where execution issued within five years, leave of court is unnecessary. *Guiterman v. Coutant*, 59 Misc. 23, 111 N. Y. Supp. 1081.

**3070** n. 79. *Partridge v. Moynihan*, 59 Misc. 234, 110 N. Y. Supp. 539.

**3071** n. 81. *Partridge v. Moynihan*, 59 Misc. 234, 110 N. Y. Supp. 539. See also *Schiller v. Weinstein*, 94 N. Y. Supp. 764.

**3073** § 2211. Where leave is granted, the lien of the execution when levied is superior to the rights of incumbrances and purchasers whose rights accrued subsequent to their knowledge of the notice of motion for leave to issue execution. *Lyons Nat. Bank v. Shuler*, 115 App. Div. 859, 101 N. Y. Supp. 62.

**3081** n. 136. *Sartorelli v. Ezagni*, 64 Misc. 115, 118 N. Y. Supp. 46.

**3083.** Where it appears, on an application for leave to issue execution on a judgment against an administrator, that a fund held by the administrator consists of a part of the proceeds of a judgment against the government in favor of the decedent, and the affidavit of the administrator

expressly avers that there is not property in his hands applicable to the judgment, the court should direct an accounting. *In re Warren*, 105 App. Div. 582, 94 N. Y. Supp. 286.

**3089** § 2217. An execution issued on a judgment more than ten years after the judgment roll was filed in a county where a transcript was filed and a notice was filed and recorded may be amended by correcting a mistake in the statement of the date of filing of the judgment roll and the direction as to the property to be taken. *Burch v. Burch*, 51 Misc. 232, 100 N. Y. Supp. 814.

**3095** n. 238. *Burch v. Burch*, 51 Misc. 232, 100 N. Y. Supp. 814. Execution must correctly state the interest which the execution creditor is entitled to have sold. *Guiterman v. Coutant*, 58 Misc. 359, 109 N. Y. Supp. 666. Sufficient to state interest as an estate in fee simple. *Guiterman v. Coutant*, 59 Misc. 23, 111 N. Y. Supp. 1081. Need not require sheriff to levy upon personal property before real property. *Guiterman v. Coutant*, 59 Misc. 23, 111 N. Y. Supp. 1081.

**3098** n. 254. Provision as to indorsement applies only to executions after the death of the original judgment debtor. *Fish v. Hahn*, 56 Misc. 449, 107 N. Y. Supp. 274.

**3100** § 2228. See also ante, **3073** § 2211.

**3100** n. 261. *Starbuck v. Gebo*, 59 Misc. 332, 112 N. Y. Supp. 312.

**3107**. Choses in action not leviable. *Bayer v. Doscher*, 139 App. Div. 324, 123 N. Y. Supp. 1096.

**3109**. In second line, the clause commencing with the word "and" to fourth line, commencing with the word "the," is omitted in the Code amendments of 1911 and 1914. The statute itself having provided the remedy by action against the person or corporation refusing to pay upon presentation of such an execution, such remedy is exclusive.

There is no authority to proceed by way of summary order. *Matter of Pratt*, 158 App. Div. 695, 143 N. Y. Supp. 1025.

**3110.** Section 1391 of the Code is amended by Laws 1908, c. 148, by making it applicable to all judgments and reducing the exemption to twelve dollars per week. This amendment was held not retroactive. *Kelly v. Mulcahy*, 131 App. Div. 639, 116 N. Y. Supp. 61; *Laird v. Carton*, 116 N. Y. Supp. 851; *Osterhoudt v. Keith*, 117 N. Y. Supp. 809; *Demuth v. Kemp*, 130 App. Div. 546, 115 N. Y. Supp. 28. Contra, *Bayliss v. Ryan*, 64 Misc. 146, 117 N. Y. Supp. 1022. Prior to 1908, the Code provision did not apply where judgment was for damages for negligence. *Kelly v. Mulcahy*, 131 App. Div. 639, 116 N. Y. Supp. 61. So a judgment for professional services as a surgeon was not a judgment "for necessities sold." *Taylor v. Barker*, 108 App. Div. 21, 95 N. Y. Supp. 474. The statute does not authorize an execution against the salary of a state officer. *Osterhoudt v. Keith*, 133 App. Div. 83, 117 N. Y. Supp. 809. The remedy for the refusal of an employer to pay the garnishment plaintiff is by action and not by contempt proceedings. *Kahn v. Coles*, 115 N. Y. Supp. 885. Advances to salesman employed on commission basis as "earnings," see *Hollender & Bernheimer v. Friedenberg*, 60 Misc. 566, 112 N. Y. Supp. 467. Execution against an agent of the employer of the judgment debtor is not authorized. *Reibstein v. Stenz*, 140 App. Div. 519, 125 N. Y. Supp. 508. Value of board received in addition to cash may be considered in determining whether earnings amount to twelve dollars a week. *Burns v. Maurer*, 72 Misc. 481, 131 N. Y. Supp. 344. Voluntary allowance by husband to wife, paid periodically, they living apart, cannot be reached hereunder. *Brooks Bros. v. Cassebeer*, 157 App. Div. 683, 142 N. Y. Supp. 781. Voluntary payments by husband to wife, where they live apart, are not "debts" or "profits" and cannot be reached under this Code provision. *Brooks Bros. v. Cassebeer*, 157

App. Div. 683, 142 N. Y. Supp. 781. Fees of commissioner in condemnation proceedings cannot be subjected to execution under this provision. *Jones v. Nicoll*, 72 Misc. 483, 131 N. Y. Supp. 341. If employer, after paying over the legal percentage for one week, pursuant to the execution, thereafter by a new agreement pays the judgment debtor wages of less than twelve dollars a week, the employer is not liable to the judgment creditor. *Duffy v. Morrissey*, 82 Misc. 149, 143 N. Y. Supp. 780. Order may be made by court as distinguished from by a judge. *Neu v. Fox*, 151 App. Div. 17, 135 N. Y. Supp. 208. Court may require notice of the application to be given to the judgment debtor. *Brodie v. Maher*, 78 Misc. 92, 138 N. Y. Supp. 872. Satisfactory proof of the facts required to be shown is necessary. *Brodie v. Maher*, 78 Misc. 92, 138 N. Y. Supp. 872. Order must be applied for in district where judgment debtor lives. *Brodie v. Hogan*, 138 N. Y. Supp. 871. Application should be made in the district where execution is to be issued and levy made. *Brodie v. Maher*, 78 Misc. 92, 138 N. Y. Supp. 872. Order that levy on wages shall become a continuing levy should not provide for payment of disbursements incurred since obtaining the judgment. *Brodie v. Hogan*, 138 N. Y. Supp. 871. An action under this section to recover the percentage of indebtedness which the person owing refuses to pay need not be brought in the court in which the original judgment was entered, need not join the judgment debtor as a defendant, and need not allege that there is no other execution outstanding. *Van Wie v. Delaware & H. Co.*, 71 Misc. 25, 127 N. Y. Supp. 184. The following was added by amendment in 1911: "But only one execution against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor shall be satisfied at one time and where more than one execution has been issued or shall be issued pursuant to the provisions of this section against the same judgment debtor, they shall be satisfied in the

order of priority in which such executions are presented to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing." It was further amended in 1911 by adding at the end the following sentence: "This section, so far as it relates to wages and salary, due and owing or to become due and owing to the judgment debtor, shall not apply to judgments recovered more than ten years prior to September first, nineteen hundred and eight, and any execution heretofore issued upon such judgments pursuant to an order heretofore granted under this section shall, when this act takes effect, cease to be a lien and continuing levy upon wages and salary thereafter to become due and owing to the judgment debtor." This modifies decisions that under the 1908 amendment the court may allow execution to issue against wages, although the judgment upon which the execution is sought was rendered before the enactment of the amendment. *Laird v. Carton*, 196 N. Y. 169, 172; *Myers v. Moran*, 113 App. Div. 427, 99 N. Y. Supp. 269 (holding that the amendment is retroactive and applies to judgments docketed before its passage). But see *Ringe v. Mortimer*, 116 App. Div. 722, 101 N. Y. Supp. 1110. The last clause of section 1391 as amended by Laws of 1911, chapter 532, which provides that the section "shall not apply to judgments recovered more than ten years prior to September 1, 1908," does not apply to a judgment recovered in 1906, and there is no provision express or implied which extends the exception to the date of the recovery of an original judgment upon which subsequent judgments may be based. *Hatch v. Wolff*, 85 Misc. 51, 147 N. Y. Supp. 48. The clause of the section, "that any execution theretofore issued upon such judgments shall cease to be a lien *when this act takes effect*" (September 1, 1911), entitles plaintiff to recover the amount due from defendants for the period from the time execution was issued until September 1, 1911. *Hatch v.*

Wolff, 85 Misc. 51, 147 N. Y. Supp. 48. The provision was further amended in 1914 (c. 347) by adding the following: "When an execution has been issued against the wages, debts, earnings, salary, income from trust funds or profits due and owing to any judgment debtor, pursuant to the provisions of this chapter, it shall be the duty of the sheriff or other officer or person to whom such execution shall be delivered, from time to time, and at least once every six months from the time a levy shall be made thereunder, to account for and pay over, to the person entitled thereto, all moneys collected thereon, less his lawful fees and expenses for collecting the same. This section shall apply to all such executions now issued and outstanding." This section was also amended in 1914 (c. 352) by making it not applicable, so far as wages and salary are concerned, "to judgments heretofore or hereafter recovered upon such judgments."

**3110 n. 328a.** Execution can be issued against the income from a trust fund created by a will probated prior to the passage of this Code provision. *Brearly School v. Ward*, 201 N. Y. 358, 94 N. E. 1001 [aff. 138 App. Div. 833, 123 N. Y. Supp. 614, which rev. 67 Misc. 163, 121 N. Y. Supp. 691].

**3110 n. 329.** See ante, **3110**. *Hedges v. Keisler*, 135 App. Div. 12, 119 N. Y. Supp. 751.

**3110 n. 330.** *Matter of Royal Bank*, 140 App. Div. 480, 125 N. Y. Supp. 322; *Bloomington v. Richardson*, 140 App. Div. 350, 125 N. Y. Supp. 320. Right to appeal from order vacating prior execution is waived by obtaining new order for an execution. *O'Brien v. Kelly*, 134 App. Div. 562, 119 N. Y. Supp. 613.

**3119 n. 385.** The sheriff may maintain an action of conversion against one who takes the property levied on. *Dickinson v. Oliver*, 112 App. Div. 806, 99 N. Y. Supp. 432.

**3120 n. 391a.** Condition imposed that appellant pay sheriff's and keeper's fees. *Wall St. Exchange Bldg.*

Ass'n v. New York & W. Consol. Oil Co., 107 N. Y. Supp. 884.

**3121** n. 399. *Cohen v. Sobel*, 62 Misc. 306, 114 N. Y. Supp. 774.

**3127** n. 442. Section 1429 of the Code is amended by Laws 1907, c. 244, by adding the following sentence: "Where perishable property has been levied upon by virtue of an execution the court may, upon the application of the officer making the levy, by order, direct the sale thereof at such a time and upon such notice as it deems proper; and, thereupon, the property must be sold accordingly."

**3131** § 2245. Title does not pass until the bid is paid. *Rowe v. Granger*, 118 App. Div. 459, 103 N. Y. Supp. 439. Sale must be for cash. *Watson & Pittinger v. Hoboken Planing Mills Co.*, 156 App. Div. 8, 140 N. Y. Supp. 822.

**3131** § 2246. Where a sale is merely of the judgment debtor's right and interest in certain lumber, a carrier having a lien on it who becomes the purchaser at such sale cannot have the sale set aside because the sheriff would not credit the amount of the lien on the bid. *Watson & Pittinger v. Hoboken Planing Mills Co.*, 156 App. Div. 8, 140 N. Y. Supp. 822.

**3132** n. 491. See *Lipschitz v. Halperin*, 53 Misc. 280, 103 N. Y. Supp. 202.

**3138** n. 545. *Higgins v. Downs*, 101 App. Div. 119, 91 N. Y. Supp. 937.

**3151** n. 657. As a defense, defendant may prove that the judgment creditor assigned the judgment on which the execution was based, before the issuance of the execution. *Matter of Mawson*, 182 N. Y. 234.

**3161** n. 727. This statute is expressly repealed by Laws 1909, c. 65.

**3182** § 2280. Return of nulla bona includes, it seems, both real and personal property. *Card v. Groesbeck*, 140 App. Div. 30, 124 N. Y. Supp. 372.

**3185** n. 872. This Code provision is now Cons. Laws, c. 30, § 758.

**3188.** Where the judgment is void and an execution has been issued the better practice is to move to set aside the judgment although it is proper to move to set aside the execution. *Burch v. Burch*, 116 App. Div. 865, 102 N. Y. Supp. 305.

**3191** § 2291. Stay of proceedings to enforce judgment, see *Moore v. Moore*, 141 App. Div. 533, 126 N. Y. Supp. 413.

**3192** n. 936a. The *Durst* case is officially reported in 45 Misc. 627.

**3193** n. 945. The sheriff may be sued for conversion, where he has sold the property of one other than the judgment debtor, although at the commencement of the action the purchasers at the sale had not actually removed the property. *Hill v. Page*, 108 App. Div. 71, 95 N. Y. Supp. 465. An execution creditor who gives no specific instructions to the officer as to the levy to be made is not liable for the act of the officer in levying on the property of a third person. *Milella v. Simpson*, 47 Misc. 690, 94 N. Y. Supp. 464; *Siersema v. Meyer*, 38 Misc. 358, 77 N. Y. Supp. 901.

## CHAPTER II

### EXECUTION AGAINST THE PERSON

**3197** § 2296. In an action against a woman for conversion based on her refusal to deliver personal property held on storage unless the cartage and warehouse charges were paid, she is not entitled to an execution against the person of the defeated plaintiff where there was no order of arrest. *Allen v. Fromme*, 195 N. Y. 404, 88 N. E. 645 [reversing 124 App. Div. 936, 940, 109 N. Y. Supp. 1123].

**3197** n. 5. *Dauids v. Brooklyn Heights R. Co.*, is reversed in 104 App. Div. 23, 93 N. Y. Supp. 285, on this point.



**3199** n. 12. But there must be proof that the defendant knew the allegations to be false. *Booth v. Englert*, 105 App. Div. 284, 94 N. Y. Supp. 700.

**3200** n. 14. *Fenton v. Duckworth*, 131 App. Div. 291, 115 N. Y. Supp. 686 [citing *Nichols' New York Pr.*, vol. 3, pp. 3199, 3200].

**3202** n. 28. *Chaucherie v. Popper*, 58 Misc. 363, 109 N. Y. Supp. 675.

**3203** § 2299. Must be issued within ten days from time execution against property is returned unsatisfied. *Levison v. Harris*, 134 N. Y. Supp. 12.

**3203** n. 40. Without regard to defendant's residence. *Spilker v. Abrahams*, 136 App. Div. 841, 121 N. Y. Supp. 818.

**3207** n. 67. "We think that they are also suspended as to all property in which the imprisoned debtor has an interest, as for instance copartnership property, for to permit the creditor to reach copartnership property by proceedings against the debtor not held in execution would in effect authorize proceedings against the imprisoned debtor's property and thus do by indirection what may not be done directly. It is urged, however, that notwithstanding the imprisoned debtor may not be proceeded against in supplementary proceedings, and assuming that because of his imprisonment such proceedings may not be prosecuted to discover copartnership property, still the proceedings may be continued for the purpose of discovering the individual property of the non-imprisoned debtor and compelling its application to the payment of the judgment debt for which he is severally as well as jointly liable. This suggestion, however, loses sight of the fact that the several liability of a copartner and the obligation to apply his individual property to the payment of a copartnership debt attach only after the copartnership assets have been exhausted or have proven insufficient to pay the debt. If, therefore, for the reasons above

stated recourse cannot be had to the copartnership assets while one copartner is held in execution the condition cannot arise or be created in which it would be permissible to resort to the individual property of any one of the copartners even if he were not the one held in execution." *Everall v. Stevens*, 158 App. Div. 584, 139 N. Y. Supp. 190.

**3208 § 2303.** On a motion to set aside a body execution on the ground that the action is not one in which such an execution can issue, the moving party may show the theory on which the action was tried and decided. *Booth v. Engleert*, 105 App. Div. 284, 94 N. Y. Supp. 700.

**3209 n. 86.** This Code provision is amended by Laws 1909, c. 65, so as to read as follows: "A person arrested, by virtue of an order of arrest, in an action or special proceeding brought in a court of record; or of an execution issued upon a judgment rendered in a court of record; or surrendered in exoneration of his bail; must be safely kept in custody, in the manner prescribed by law, and, except as otherwise prescribed in the next section, and in subdivision nineteen of section two hundred and forty of the county law, at his own expense, until he satisfies the judgment rendered against him, or is discharged according to law."

**3210.** Liability for escape, see *Lowman v. Billington*, 65 Misc. 111, 119 N. Y. Supp. 825.

**3210 n. 89.** This Code provision is now Cons. Laws, c. 11, § 240.

**3210 n. 90.** These Code provisions are now Cons. Laws, c. 43, §§ 340-344.

**3210 n. 91.** It is a defense that the discharge was under an order of court, although the order was irregular. *Goldreyer v. Foley*, 154 App. Div. 584, 139 N. Y. Supp. 190.

**3211 n. 102.** It is a defense that the judgment has been set aside. *Battle v. National Surety Co.*, 78 Misc. 253, 138 N. Y. Supp. 46.

## CHAPTER III

## JUDICIAL SALES

**3216.** Judicial sales are not within the statute forbidding the sale of lands in the possession of a third person who claims under an adverse title. *Da Garmo v. Phelps*, 176 N. Y. 455, 68 N. E. 873.

**3217** n. 5. *State Realty & Mortgage Co. v. Villaume*, 121 App. Div. 793, 106 N. Y. Supp. 698.

**3221** n. 36. Section 1242 of the Code was amended in 1911 as to require the property to be sold in the county "and borough" where it is situated; the words "and borough" being added.

**3226** n. 152. *Koechl v. Gate Development Co.*, 149 App. Div. 239, 133 N. Y. Supp. 763.

**3229** n. 88. *Matter of Superintendent of Banks*, 207 N. Y. 11, 100 N. E. 428; *State Realty & Mortgage Co. v. Villaume*, 121 App. Div. 793, 106 N. Y. Supp. 698; *Wilber v. Wilber*, 119 App. Div. 740, 104 N. Y. Supp. 179.

**3230** n. 98. *Compare State Realty & Mortgage Co. v. Villaume*, 121 App. Div. 793, 106 N. Y. Supp. 698.

**3230** n. 103. A judicial sale cannot be set aside, "as a matter of right," because the sale was in mass. *Vingut v. Ketcham*, 102 App. Div. 403, 92 N. Y. Supp. 605.

**3232.** The order cannot substantially amend the judgment, under which the sale was made. *Vingut v. Ketcham*, 102 App. Div. 403, 92 N. Y. Supp. 605.

**3232** n. 117. Terms may be imposed where the setting aside of the sale rests in the discretion of the court. *Vingut v. Ketcham*, 102 App. Div. 403, 92 N. Y. Supp. 605.

**3233** § 2316. That agreements with the parties in interest have become impossible through the death of one of them is ground. *Willeys v. Whitson*, 69 Misc. 229, 125 N. Y. Supp. 135. That an appeal is pending from the judgment under

which the property was sold is no objection to the title. *Ebert v. Hanneman*, 69 Misc. 223, 125 N. Y. Supp. 237. Where the mistake in a description of lands sold on foreclosure consists in the substitution of the word "south-westerly" for the word "southeasterly," the inaccuracy is not such a defect as justifies the purchaser in declining to accept title. *Downes v. Wenninger*, 207 N. Y. 286, 100 N. E. 814. Where, on a motion by the assignee of a purchaser at a foreclosure sale to be relieved from his bid because of a defect in the title to the premises, it appears that a third person may be in a position to assert a claim which will require litigation to determine and which cannot be definitely settled in the proceeding, to which such person is not a party, the court will grant the relief asked. *Ridley v. Walter*, 153 App. Div. 65, 137 N. Y. Supp. 1050. Purchaser cannot set up as ground for relief that it is not a purchaser in good faith without notice. *People's Trust Co. v. Tonkonogy*, 144 App. Div. 133, 128 N. Y. Supp. 1055. Where the purchaser is relieved because the title is defective, the court cannot thereafter vacate the order and direct a conveyance to the assignee of the purchaser's bid. *Ely v. Matthews*, 128 App. Div. 513, 112 N. Y. Supp. 788.

**3233** n. 122. *Whalen v. Stuart*, 123 App. Div. 446, 108 N. Y. Supp. 355. Buildings encroaching on adjoining property. *Moser v. Ellis*, 106 N. Y. Supp. 1075.

**3233** n. 123. *Timmermann v. Batterman*, 204 N. Y. 614, 97 N. E. 589; *Wanser v. De Nyse*, 188 N. Y. 378, 80 N. E. 1088.

**3234** n. 135. *Timmermann v. Cohn*, 70 Misc. 327, 128 N. Y. Supp. 770; *Wanser v. De Nyse*, 188 N. Y. 378, 80 N. E. 1088. See also *Messinger v. Foster*, 115 App. Div. 689, 101 N. Y. Supp. 387.

**3236** n. 148. Failure to make proof as required in case of substituted service of summons is ground. *Lauder v. Miscrole*, 148 App. Div. 739, 133 N. Y. Supp. 340.

**3236** n. 151. So the failure to file the order is ground. *Fink v. Wallach*, 47 Misc. 247, 95 N. Y. Supp. 872.

**3237**. Where the mortgages on the property were all due more than twenty years before the judicial sale in a partition suit, the title is marketable. *Ouvrier v. Mahon*, 117 App. Div. 749, 102 N. Y. Supp. 981.

**3237** n. 154. *Heim v. Schwoerer*, 115 App. Div. 295, 100 N. Y. Supp. 808. Compare *Ebert v. Hanneman*, 69 Misc. 223, 125 N. Y. Supp. 237. A *lis pendens* does not, of itself, constitute an incumbrance warranting the purchaser to refuse to complete. *Baecht v. Hevesy*, 115 App. Div. 509, 101 N. Y. Supp. 413.

**3237** n. 156. Otherwise where mortgage outlawed. *Williamsburgh Trust Co. v. Gottsch*, 121 N. Y. Supp. 890.

**3238** n. 168. The purchaser of land on sale under foreclosure is not bound to incur the expense of independent proceedings to oust the occupants of the land whatever may be the character of their tenancy. *Downes v. Wenninger*, 207 N. Y. 286, 100 N. E. 814.

**3239**. Where the purchaser seeks relief from his purchase by motion, he must offer evidence in justification of his refusal to perform, unless the defect is patent in the record. *Title Guarantee & Trust Co. v. Fallon*, 101 App. Div. 187, 91 N. Y. Supp. 497.

**3239** § 2317. An order for a resale, after failure to pay the bid, is *res judicata* as to the right to be relieved from the bid. *Egan v. Buellesbach*, 116 App. Div. 306, 101 N. Y. Supp. 476.

**3240** n. 177. *State Bank v. Wilchinsky*, 128 App. Div. 485, 112 N. Y. Supp. 1002.

**3240** n. 178. The court need not order a reference of its own motion where there is a dispute as to the sufficiency of the title. *Wanser v. De Nyse*, 188 N. Y. 378, 80 N. E. 1088. The motion may be based on the bid and the signing the terms of sale by which the bidder agrees to complete his

purchase at a specified time. If answering affidavits are read to show the title defective, the court may allow the production of such further affidavits relating to the title as may be necessary or desirable to bring to the attention of the court the true facts in regard thereto. *Wanser v. De Nyse*, 188 N. Y. 378, 80 N. E. 1088.

**3241** n. 188. Failure to serve formal notice of a resale, where the judgment provides for a resale on failure to pay the bid, is not fatal where the purchaser had actual notice. *Egan v. Buellesbach*, 116 App. Div. 306, 101 N. Y. Supp. 476.

**3241** n. 189. *Baecht v. Hevesy*, 115 App. Div. 509, 101 N. Y. Supp. 413.

**3246** § 2323. The fees of a referee appointed in a judgment of partition, when the real property is sold, are to be computed upon the price the property brings. *Duffy v. Muller*, 52 Misc. 11, 102 N. Y. Supp. 296.

## CHAPTER IV

### SUPPLEMENTARY PROCEEDINGS

**3255** n. 4. But see *Deane v. Sire*, 48 Misc. 606, 95 N. Y. Supp. 556.

**3255** n. 8. Each of the remedies provided by section 2432 of the Code must be prosecuted as a special proceeding. *Harris v. Weiss*, 105 N. Y. Supp. 8.

**3255** § 2327. An order to examine a third person should not be granted where the judgment creditor has commenced an action to set aside conveyances made by the judgment debtor to such third person. *Lowther v. Lowther*, 110 App. Div. 122, 97 N. Y. Supp. 5.

**3256** n. 10. *Garcia v. Morris*, 51 Misc. 592, 101 N. Y. Supp. 253.

**3256** n. 12. No defense third person claims an interest adverse to the judgment debtor. *Matter of First Nat.*

*Bank v. Gow*, Nos. 1 and 2, 139 App. Div. 576, 582, 124 N. Y. Supp. 449, 454. "There is, however, no absolute right to an order for the examination of a third party unless the property be such that if the claim of the judgment creditor with respect thereto were conceded the judge could order the property delivered to a receiver or to the sheriff, and unless such course be necessary for the protection of the rights of the judgment creditor." *First Nat. Bank v. Gow*, 139 App. Div. 576, 580, 124 N. Y. Supp. 449. "There must be a bona fide claim by the judgment creditor that the third party has in his possession some specific personal property of the judgment debtor which is capable of delivery to warrant the judge in granting the order or permitting it to stand." *First Nat. Bank v. Gow*, 139 App. Div. 576, 580, 124 N. Y. Supp. 449.

**3257** § 2328. Third party order should not issue where such party is under subpoena as a witness in supplementary proceedings against the debtor. *Steinmann v. Hosier*, 139 N. Y. Supp. 863. If subpoenaed as a witness in proceeding against the debtor, cannot be examined under a third party order until after examination as a witness. *Steinmann v. Hosier*, 139 N. Y. Supp. 863. Order for examination of third person should not be granted where he has been subpoenaed to appear at the examination of the judgment debtor and he can be as fully examined under the subpoena as under the order. *Matter of First Nat. Bank v. Gow*, No. 1, 139 App. Div. 576, 124 N. Y. Supp. 449. Appointment of receiver of judgment debtor in supplementary proceedings does not preclude order for examination of third party. *Denison v. Jackson Bros. Realty Co.*, 158 App. Div. 475, 143 N. Y. Supp. 586 [foll. *Smith v. Cutter*, 64 App. Div. 412, 72 N. Y. Supp. 99, and disapproving dicta to the contrary in *Sorrentino v. Langlois*, 144 App. Div. 271, 128 N. Y. Supp. 1003]; *Howell v. German Theatre*, 106 N. Y. Supp. 1124. *Contra*, *Steinmann v. Hosier*, 139 N. Y. Supp. 863.

**3257** n. 22. In re Albright, 55 Misc. 324, 105 N. Y. Supp. 486.

**3258** § 2329. A third party order should be vacated where pending supplementary proceedings are discontinued on the creditor accepting the debtor's notes and checks to be applied on the judgment when paid. Swalm v. Lyons, 59 Misc. 384, 112 N. Y. Supp. 355.

**3258** n. 27. In re American Fidelity Co., 122 App. Div. 93, 106 N. Y. Supp. 738. The assignee of the judgment may institute the proceeding in the name of the assignor. Maigille v. Leonard, 102 App. Div. 367, 92 N. Y. Supp. 656.

**3258** n. 34. This amendment of 1896 does not include a creditor for costs given by an interlocutory order in an action. In re Stoddard, 128 App. Div. 759, 113 N. Y. Supp. 157.

**3259** n. 42. Keystone Pub. Co. v. Hill Dryer Co., 55 Misc. 625, 105 N. Y. Supp. 894. Section 2463 of the Code is amended by Laws 1908, c. 278, by striking out the clause providing that the Code provisions as to supplementary proceedings do not apply "where the judgment debtor is a corporation created by or under the laws of the state or a foreign corporation specified in section one thousand eight hundred and twelve of this act, except in those actions or special pleadings brought by or against the people of the state." Under such amendment, supplementary proceedings may be instituted against a corporation the same as an individual, and a receiver may be appointed. Rabbe v. Astor Trust Co., 61 Misc. 650, 114 N. Y. Supp. 131.

**3259** n. 44. This rule has been changed by Laws 1908, c. 278. Meyer v. Consolidated Ice Co., 116 N. Y. Supp. 906.

**3260** § 2331. Ten-year limitation does not apply to an order issued in aid of an execution and before its return. Press Pub. Co. v. McGill, 136 N. Y. Supp. 177.

**3260** n. 47. The appointment of a receiver need not be within the ten years. Fawcett v. New York, 112 App. Div. 155, 98 N. Y. Supp. 286.



**3260** n. 49. New execution cannot be issued after ten years except by order of court. *Matter of Drake v. Barry*, 73 Misc. 391, 131 N. Y. Supp. 39.

**3263** n. 71. Mere fact that monthly salary is \$233.33 and that debtor maintains home in New York City and has wife and two children does not show earnings necessary for use of family. *Twelfth Ward Bank v. Hamilton*, 58 Misc. 173, 109 N. Y. Supp. 21. Net profits of building contract held earnings. *Murray Hill Co. v. Kuhnle*, 58 Misc. 313, 109 N. Y. Supp. 669.

**3263** n. 72. *Murray Hill Co. v. Kuhnle*, 58 Misc. 313, 109 N. Y. Supp. 669.

**3266** § 2333. New order not proper until first proceeding discontinued. *Crystal v. Crystal*, 120 N. Y. Supp. 50. The fact that a receiver has been appointed at the instance of one judgment creditor does not affect the right of other judgment creditors to at least one examination of the debtor or of a third person. *Matter of Walker*, 157 App. Div. 609, 142 N. Y. Supp. 992 [rev. on this point 80 Misc. 389, 141 N. Y. Supp. 265, and disapproving, so far as to the contrary, *Sorrentino v. Langlois*, 144 App. Div. 271; *Steinmann v. Conlon*, 150 App. Div. 708]. Where affidavit shows new property, former order need not be first vacated. If earlier proceeding is not closed, the two may be consolidated. *Bendick v. Meyer*, 72 Misc. 156, 129 N. Y. Supp. 772.

**3266** n. 95. An order will not be set aside in the absence of an affidavit of the debtor that he has no property applicable to the payment of the judgment where the first judgment was in an action in a representative capacity while the second action was brought individually. *Smith v. Cowles*, 114 App. Div. 295, 99 N. Y. Supp. 747.

**3267** n. 103. *Tobias v. Walton*, 116 N. Y. Supp. 587.

**3268** n. 110. *Happel v. Lippe*, 48 Misc. 605, 95 N. Y. Supp. 523. Objection that order directing delivery of property to receiver is in form a court order instead of a judge's

order cannot be considered on appeal from an order in contempt proceedings for failure to deliver the property. *Goldreyer v. Shatz*, 114 N. Y. Supp. 339.

**3269** § 2337. Authority to make orders in supplementary proceedings is conferred upon the judges and not upon the court. *Matter of Ehrich v. Root*, 134 App. Div. 432, 119 N. Y. Supp. 395.

**3269** n. 121. *Morrison v. Stember*, 49 Misc. 464, 98 N. Y. Supp. 850. This does not prevent the "court" from giving effect to an order duly made by fixing a time for the examination where it could not be had at the time prescribed by the order because of a stay procured by the party sought to be examined. *Grant v. Greene*, 121 App. Div. 761, 106 N. Y. Supp. 535.

**3270** n. 129. *Fine v. Rabinbauer*, 49 Misc. 437, 99 N. Y. Supp. 896. Subdivision 5 is not repealed by the Municipal Court Act. *Hottenroth v. Flaherty*, 61 Misc. 108, 112 N. Y. Supp. 1111. By amendment in 1911, the word "municipal" is substituted for district. On transcript of judgment of Municipal Court of New York, justice of Supreme Court has jurisdiction. *Owens v. Ford*, 68 Misc. 522, 124 N. Y. Supp. 839. City Court of New York may entertain proceedings based on judgment of Municipal Court for the borough of Brooklyn. *Ellenbogen v. Hantman*, 126 N. Y. Supp. 164.

**3271** n. 130. *Morrison v. Stember*, 49 Misc. 464, 98 N. Y. Supp. 850.

**3271** n. 135. Cannot be based on judgment obtained under § 1919 of the Code against one as attorney in fact. *Matter of Kriegman v. Dumphy*, 66 Misc. 221, 122 N. Y. Supp. 1116.

**3271** n. 136. *Sartorelli v. Ezagni*, 64 Misc. 115, 118 N. Y. Supp. 46.

**3272** § 2341. An examination in proceedings supplementary to execution may be had where the name of the defend-

ant is given as fictitious, providing there is added, to the fictitious name a description of the person sufficient to identify the person intended, but where the true name is known the proceedings must be amended. *Simon v. Underwood*, 61 Misc. 369, 115 N. Y. Supp. 65. Where a person has been sued by a fictitious name or by a name part of which is designated as fictitious, real name being unknown, and the person fails to appear, a judgment predicated thereon is irregular, unless the summons and the judgment contain description sufficient for the identification of the defendant for the purpose of having execution against the property of the debtor thus described. Such a judgment is not void, but irregular, and no order for examination in supplementary proceedings can be granted upon such a judgment. *Simon v. Underwood*, 61 Misc. 369, 115 N. Y. Supp. 65. Judgment against debtor under a fictitious Christian name, his real name being unknown, is sufficient as a basis. *J. R. Smith Co. v. Josephson*, 107 N. Y. Supp. 221; *Minsky v. Strausky*, 107 N. Y. Supp. 220. Judgment of Municipal Court of New York City recovered on substituted service may be basis. *In re Cotton*, 55 Misc. 321, 105 N. Y. Supp. 347.

**2372 n. 143.** See also *Belfer v. Ludlow*, 144 App. Div. 746, 129 N. Y. Supp. 626.

**3273 n. 144.** *Hall v. Senior*, 54 Misc. 463, 106 N. Y. Supp. 29.

**3273 n. 146.** But supplementary proceedings may be based on a judgment for unpaid alimony, although rendered on a motion after failure to pay installments of alimony. *Matter of Donovan*, 159 App. Div. 228, 144 N. Y. Supp. 280.

**3273 n. 152.** Judgments of Municipal Court of New York City, see *Mede v. Meyer*, 55 Misc. 621, 105 N. Y. Supp. 957.

**3274 n. 159.** *Contra*, *In re Stoddard*, 128 App. Div. 759, 113 N. Y. Supp. 157 (expressly disapproving *Matter of Sirrett*, 25 Misc. 89, 54 N. Y. Supp. 666).

**3275 § 2344.** Execution not enforceable generally against

all of property of judgment debtor is an insufficient basis. *Belfer v. Ludlow*, 144 App. Div. 746, 129 N. Y. Supp. 626.

**3277** n. 167. *Solomon v. Rosenfeld & Co.*, 114 N. Y. Supp. 770.

**3280** n. 190. May be made by clerk in attorney's office. *Bridges v. Koppelman*, 63 Misc. 27, 117 N. Y. Supp. 306. Affidavit by associated attorney is insufficient. *Beardsley v. Stone Valley Distilling Co.*, 122 N. Y. Supp. 686. Affidavit made by "attorney connected with the office of the attorney for the plaintiff," is not sufficient. *Title Guarantee & Trust Co. v. Brown*, 136 App. Div. 843, 121 N. Y. Supp. 891.

**3280** n. 192. *Contra*, *Harris v. Weiss*, 105 N. Y. Supp. 8 (where order entitled in action was vacated). Compare *McAlpin v. Stoddard*, 54 Misc. 647, 105 N. Y. Supp. 9. Title describing those who were plaintiffs in the action as "judgment creditors and plaintiffs" and defendants as "judgment debtors and defendants" sufficiently indicates a special proceeding. *Owens v. Ford*, 68 Misc. 522, 124 N. Y. Supp. 839.

**3280** n. 195. *Smith v. Haverty's Stables*, 157 App. Div. 777, 142 N. Y. Supp. 764; *Garcia v. Morris*, 51 Misc. 592, 101 N. Y. Supp. 253.

**3280** n. 198. Stating that the judgment was "duly assigned" is sufficient. *Seeley v. Connors*, 109 App. Div. 279, 95 N. Y. Supp. 1109.

**3281** n. 202. But an affidavit is not defective because it states the amount of the judgment as reduced on a retaxation of costs when the facts are well known to the debtor. *Seeley v. Connors*, 109 App. Div. 279, 95 N. Y. Supp. 1109.

**3282** n. 211. Mistake held not fatal, see *Bridges v. Koppelman*, 63 Misc. 27, 117 N. Y. Supp. 306.

**3282** n. 213. But see *Hilbring v. Wisausky*, 59 Misc. 149, 110 N. Y. Supp. 184, holding that where proceedings in the New York City Court are based on a judgment of

the Municipal Court, the allegations as to the judgment must show the jurisdictional facts or state it was duly rendered. An allegation in an affidavit in the New York City Court based on a Municipal Court judgment that the judgment was "duly recovered" is sufficient. *Hottenroth v. Flaherty*, 61 Misc. 108, 112 N. Y. Supp. 1111.

**3282** n. 217. Must show that an execution was issued out of the proper court. *Roth v. Light*, 135 N. Y. Supp. 601.

**3283** n. 221. The affidavit must show the residence of the debtor at the time of issuing of the execution, it not being sufficient to show his residence at the time of the commencement of the supplementary proceedings and the making of the affidavit. *Katz v. Kosower*, 63 Misc. 25, 117 N. Y. Supp. 316.

**3285** n. 231. An affidavit is insufficient where it is based wholly on information and belief without stating the grounds of information or the sources of belief, or where it does not show the ownership of property free from the claims of third persons. *Garcia v. Morris*, 51 Misc. 592, 101 N. Y. Supp. 253.

**3285** n. 233. Carbonating Apparatus Co. v. Bennett, 105 N. Y. Supp. 1052; *Garcia v. Morris*, 51 Misc. 592, 101 N. Y. Supp. 253.

**3285** n. 235. Money deposited in bank is not subject to levy within this rule. *Summerfield v. Goldstein*, 59 Misc. 387, 112 N. Y. Supp. 357.

**3286** n. 236. Dower interest in real estate claimed to have been fraudulently assigned is not such property as warrants a third party order. *Steinmann v. Hosier*, 139 N. Y. Supp. 863.

**3286** n. 238. *Sorrentino v. Langlois*, 144 App. Div. 271, 128 N. Y. Supp. 1003; *Lowther v. Lowther*, 110 App. Div. 122, 97 N. Y. Supp. 5.

**3288** n. 255. Omission may be ignored on appeal where affidavits on motion to vacate the second order show new

property. *Matter of Walker*, 157 App. Div. 609, 142 N. Y. Supp. 972.

3289 n. 258. See ante, 3280 n. 192.

3289 § 2352. Order must be signed by judge rather than by clerk. *Ward v. Stoddard*, 144 App. Div. 143, 128 N. Y. Supp. 846, 2 Civ. Pro. Rep. (N. S.) 375. Allegation in order that execution was "issued out of the supreme court" is sufficient though order was based on transcript of judgment of Municipal Court of New York. *Jaques v. Willett*, 104 N. Y. Supp. 500.

3292 n. 279. The irregularity in not naming the justice to whom the evidence is to be returned may be waived by failure to promptly raise the objection. *Lewis v. Beach*, 112 N. Y. Supp. 200.

3294 § 2355. Irregularity in service is waived by appearance and answering to the merits. *Becker v. Gerlich*, 72 Misc. 157, 129 N. Y. Supp. 614. The order for the examination of a third person cannot be served by the judgment debtor. *Matter of Dawes*, 108 App. Div. 174, 96 N. Y. Supp. 52. Service may be had on debtor while acting as juror. *Brown v. Edinger*, 61 Misc. 366, 114 N. Y. Supp. 1116.

3295 n. 289. *Meyer v. Consolidated Ice Co.*, 132 App. Div. 265, 116 N. Y. Supp. 906. Provision for service on officer of corporation is exclusive of any other service. *Meyer v. Consolidated Ice Co.*, 196 N. Y. 471, 90 N. E. 54 [aff. 132 App. Div. 265]. It is not sufficient service of an order in supplementary proceedings, by which a foreign corporation is required to make discovery on oath concerning its property, to deliver such order to a person designated by the corporation as one upon whom a summons might be served in accordance with the General Corporation Law and section 432 of the Code of Civil Procedure, but such service must be made in accordance with section 2452 of the Code upon an officer of the corporation. *Meyer v. Consolidated Ice Co.*, 196 N. Y. 471, 90 N. E. 54 [aff. 132 App. Div. 265].

**3298 § 2358.** A judge may extend time by initialing an order in supplementary proceedings, made by another judge, without invalidating the original order. *Bridges v. Koppelman*, 63 Misc. 27, 117 N. Y. Supp. 306. *Contra*, *Ward v. Stoddard*, 144 App. Div. 143, 128 N. Y. Supp. 846, 2 Civ. Pro. Rep. (N. S.) 375 [aff. 70 Misc. 506, 127 N. Y. Supp. 713]. *Vogel v. Ninmark*, 62 Misc. 591, 116 N. Y. Supp. 825. Provision for adjournment of examination from time to time may be stricken out as superfluous, and hence a mistake therein is not ground for vacating the order. *Muller v. Philadelphia*, 55 Misc. 30, 104 N. Y. Supp. 782. The order will not be vacated because the execution was returned unsatisfied at the request of plaintiff's attorney where a sale would realize nothing because of the incumbrances on the property. *Maloney v. Klein*, 116 App. Div. 790, 102 N. Y. Supp. 43. Court may vacate ex parte order made by a justice thereof. *Belfer v. Ludlow*, 144 App. Div. 746, 129 N. Y. Supp. 626. Order for examination "while execution is outstanding" will not be vacated because ten years have elapsed since return of prior execution nor because it was not shown that all legal remedies had been exhausted. *R. F. Stevens Co. v. Mans*, 155 App. Div. 249, 139 N. Y. Supp. 1059.

**3298 n. 314.** *Ward v. Stoddard*, 144 App. Div. 143, 128 N. Y. Supp. 846, 2 Civ. Pro. Rep. (N. S.) 375. An order made by a judge of the New York City Court for examination of debtor in Municipal Court judgment can only be vacated by a judge of the City Court or on motion in the Supreme Court where execution issues out of that court. *McAlpin v. Stoddard*, 54 Misc. 647, 105 N. Y. Supp. 9.

**3298 n. 315.** See *In re American Fidelity Co.*, 123 App. Div. 93, 106 N. Y. Supp. 738.

**3300 n. 331.** *Thompson v. Sage*, 47 Misc. 357, 94 N. Y. Supp. 31

**3302 n. 352.** So where ground is that the judgment was

not properly entered, the motion cannot be made after having submitted to an examination. *Matter of Gerhard Mennen Chemical Co.*, 53 Misc. 370.

**3304.** Where judgment debtor's ownership in dispute, injunction not proper. *Rathers v. Kaplan*, 138 N. Y. Supp. 1002.

**3305 § 2366.** Where the judgment is for an individual debt of a partner, the injunction does not prevent an action by him as a surviving partner. *Gibbons v. Bush Co.*, 115 App. Div. 619, 101 N. Y. Supp. 721.

**3305 n. 374.** Order appointing a receiver supersedes injunction. *Sullivan v. U. S. Gas Fixture Co.*, 134 App. Div. 658, 119 N. Y. Supp. 532.

**3305 § 2367.** Person having legal title to property may move to vacate. *Rathers v. Kaplan*, 138 N. Y. Supp. 1002.

**3305 § 2368.** Assignment by assignee other than judgment debtor held not a violation. *Sullivan v. U. S. Gas Fixture Co.*, 134 App. Div. 658, 119 N. Y. Supp. 532.

**3306.** Payment as violation, see *Matter of Black*, 138 App. Div. 562, 123 N. Y. Supp. 371. Payment before service of order is not a violation of it. *Sturn v. Parsons*, 134 N. Y. Supp. 584.

**3307 n. 391.** *Sturn v. Parsons*, 134 N. Y. Supp. 584. Debtor must show exemption to avoid punishment for contempt. *Goldberger v. Tack*, 108 N. Y. Supp. 1047.

**3309 § 2371.** Warrant must recite jurisdictional facts and state the purpose of the arrest. *Matter of Barnett v. Lewinsky*, 66 Misc. 141, 121 N. Y. Supp. 378.

**3314 n. 426.** Attorney having another judgment against the debtor in his hands for collection should not be appointed. *Matter of Higley v. Novark*, 145 App. Div. 7, 129 N. Y. Supp. 759.

**3315 n. 431.** Must issue under hand of judge or referee before whom proceedings are had. *Steinmann v. Conlon*, 150 App. Div. 708, 135 N. Y. Supp. 740. Subpoenas should



be vacated where only proceeding pending is under a third party order, and examination would be futile because of appointment of receiver. *Steinmann v. Conlon*, 150 App. Div. 708, 135 N. Y. Supp. 740.

**3316 n. 432.** Judgment creditor is entitled to have book so produced put in evidence. *Steinmann v. Conlon*, 79 Misc. 527, 141 N. Y. Supp. 79.

**3316 n. 437.** Granting by referee is subject to control of judge who granted the order. *Feinberg v. Kutcosky*, 147 App. Div. 393, 132 N. Y. Supp. 9. Adjournments must be noted as they are taken. Subpoenas issued during pendency of motion to appoint receiver and at the close of the debtors' examination held invalid, where decision of motion had been reserved. *Wilson v. Bracken*, Nos. 1, 2, 150 App. Div. 577, 135 N. Y. Supp. 435. Waiver of right of witness to claim proceeding terminated by omission to take a regular adjournment, by moving to vacate subpoena, see *Westervelt v. Shapiro*, 132 N. Y. Supp. 338.

**3320 § 2387.** See also ante, 1983 n. 45.

**3320 n. 461.** See also *Matter of Depue*, 185 N. Y. 60, 77 N. E. 798.

**3321 § 2389.** Examination not limited to facts necessary for judgment creditor or receiver to establish in action to recover the property or to set aside a transfer thereof. *First Nat. Bank v. Gow*, 139 App. Div. 582, 124 N. Y. Supp. 454. Witness may be examined as to property which judgment creditors claim belongs to the judgment debtor but which the witness claims. *Matter of First Nat. Bank v. Gow*, No. 2, 139 App. Div. 582, 124 N. Y. Supp. 454.

**3322 n. 473.** Where corporation debtor has made voluntary assignment, examination may extend to circumstances of assignment. *Matter of Rutaced Co.*, 137 App. Div. 716, 122 N. Y. Supp. 454.

**3323 n. 480.** Contra, *Matter of First Nat. Bank v. Gow*, No. 1, 139 App. Div. 576, 124 N. Y. Supp. 449.

**3328 § 2395.** Where judgment has already been assigned to a third person by the judgment creditor the court should not, on motion, order him to assign it to the receiver. *William A. Thomas Co. v. Lowenthan*, 113 N. Y. Supp. 1092.

**3329.** Motion to vacate or modify the order can be made only to the judge who made the order or to the court out of which the execution was issued. *Matter of Flynn*, 80 Misc. 79, 140 N. Y. Supp. 799.

**3329 n. 514.** But court order instead of a judge's order, while open to technical objection on direct review, is not void. *Goldreyer v. Shatz*, 114 N. Y. Supp. 339.

**3331.** Exempt moneys, such as proceeds of insurance on exempt property, cannot be ordered paid to the creditor. *Bayer v. Sack*, 66 Misc. 536, 121 N. Y. Supp. 1122.

**3331 n. 531.** *Matter of Kutcosky*, 153 App. Div. 526, 138 N. Y. Supp. 263.

**3333 n. 546.** *Ghersin v. Thuor*, 56 Misc. 465, 107 N. Y. Supp. 195; *Thompson v. Sage*, 47 Misc. 357, 94 N. Y. Supp. 31; *Friedman v. Stein*, 138 N. Y. Supp. 928; *Shea v. Lynskey*, 133 N. Y. Supp. 477. In such a case, order denying motion is not an adjudication as to ownership. *Humboldt Exploration Co. v. Fritsch*, 150 App. Div. 90, 134 N. Y. Supp. 747. "The simple fact that the judgment debtor's right to possession is disputed does not deprive a judge of power under the section aforesaid. The dispute must be apparently substantial. If it be based upon controverted facts, then a judge has no power to determine the facts on such an application, but should remit the receiver to his action. If, however, the dispute arises on conceded facts and is confined to questions of law which have been well settled, can the third party by disputing the existence of well-established legal rules create a substantial dispute which will deprive the judges of power to make an order under said section? I think not. The determining fact is not the existence of a mere dispute but the apparent substantiality of the dispute."

Matter of Flynn, 157 App. Div. 241, 243, 141 N. Y. Supp. 807 [rev. on this point 80 Misc. 79, 140 N. Y. Supp. 799].

**3333** n. 547. Hurwitz v. Bernstein, 156 App. Div. 913, 141 N. Y. Supp. 1124.

**3335** n. 557. Where proceedings are pending before a judge of the City Court of New York, he can punish a judgment debtor for disobeying an order made in such proceedings. Recourse should be had to him rather than to the Supreme Court. Buchsbaum v. Laue, 63 Misc. 374, 118 N. Y. Supp. 419. Section 2457 was amended in 1911 by adding: "by the county judge, the special county judge, or the special surrogate of the county to which the execution was issued, or by the City Court of the city of New York or a justice thereof, if the proceedings were instituted before such court or any justice thereof."

**3335** § 2398. Assisting auctioneer to deprive receiver of possession is contempt on part of judgment debtor. Verdi v. La Russo, 3 N. Y. Civ. Pro. Rep. (N. S.) 13, 138 N. Y. Supp. 568.

**3336.** Failure to appear, where default has been waived, should not be punished by fine of amount of judgment. Matter of Germansky v. Guterman, 136 App. Div. 581, 121 N. Y. Supp. 121. Failure to appear is not a contempt where the attorney for the creditor has informed the debtor the requirement of the order would not be insisted on for thirty days. In re Seitz, 56 Misc. 616, 107 N. Y. Supp. 593. Authority of Special Term, where third person fails to obey order for examination, see Bird v. Wessels, 119 N. Y. Supp. 329.

**3336** n. 567. Feinberg v. Kutcosky, 147 App. Div. 393, 132 N. Y. Supp. 9. See also Westervelt v. Shapiro, 132 N. Y. Supp. 338. It is incumbent on the complaining party to show that the witness sought to be punished was paid or tendered his legal witness fees. Matter of Depue, 185

N. Y. 60, 77 N. E. 798. Fine may be imposed although no actual loss to the creditor is shown. *Goldsmiths & Silver-smiths Co. v. Haas*, 76 Misc. 210, 134 N. Y. Supp. 602.

**3337.** Ignorant foreigners not informed as to the restraining order in the papers served on them should not be punished. *Matter of Kutcosky*, 153 App. Div. 526, 138 N. Y. Supp. 263.

**3337 n. 569.** Not where affidavit upon which the supplementary proceedings are based is held insufficient, and no new or additional affidavit is filed. *Matter of Stell*, 78 Misc. 40, 137 N. Y. Supp. 703. Failure to recollect, or denial of knowledge, where incredible, is in effect a refusal to testify. *Becker v. Gerlich*, 72 Misc. 157, 129 N. Y. Supp. 614. Denials of knowledge as to matters palpably within the knowledge of the judgment debtor is a contempt, as a refusal to testify. *Becker v. Gerlich*, 72 Misc. 157, 129 N. Y. Supp. 614. Refusal to answer in absence of judge, see *Matter of Price*, 78 Misc. 42, 137 N. Y. Supp. 732.

**3337 n. 570.** *Saggese v. Virgilio*, 106 N. Y. Supp. 1100. But see *Matter of Alese v. Markowitz*, 156 App. Div. 906, 141 N. Y. Supp. 4. Evasive answers as ground, see *Shorwitz v. Caminez*, 152 App. Div. 758, 137 N. Y. Supp. 545. Cannot be punished for criminal contempt on motion. *Hurwitz v. Bernstein*, 156 App. Div. 913, 141 N. Y. Supp. 1124.

**3337 n. 574.** Failure to deliver security to receiver on payment of pledgee's demand not contempt where judgment creditor told pledgee he proposed to take no further steps in the matter. *Sullivan v. U. S. Gas Fixture Co.*, 134 App. Div. 658, 119 N. Y. Supp. 532.

**3337 n. 576.** *Goldreyer v. Shatz*, 114 N. Y. Supp. 339.

**3338 § 2399.** Where order appointing receiver is not legally served, defendant cannot be punished for contempt in failing to pay over to the receiver the property demanded. *Dowling v. Twombly*, 113 N. Y. Supp. 970. Alteration of order by another justice, thereby making it

a nullity, is a defense. *Vogel v. Ninmark*, 62 Misc. 591, 116 N. Y. Supp. 825.

**3339.** Judgment on which proceedings are based cannot be collaterally attacked. *Feinberg v. Kutcosky*, 147 App. Div. 393, 132 N. Y. Supp. 9.

**3339 n. 587.** *In re Faucher*, 58 Misc. 11, 110 N. Y. Supp. 157.

**3339 n. 590.** But see *In re Faucher*, 58 Misc. 11, 110 N. Y. Supp. 157.

**3340 § 2400.** See *In re Nejez*, 54 Misc. 38, 104 N. Y. Supp. 505. Necessity for notice to judgment creditor, where debtor discharged from imprisonment under § 775 of the Judiciary Law, see *Goldreyer v. Foley*, 154 App. Div. 584, 139 N. Y. Supp. 190. Order punishing debtor for failure to appear is not an "independent" special proceeding. *Steinmann v. Conlon*, 208 N. Y. 198, 101 N. E. 863. Extent of fine which may be imposed, see *Matter of Schwartz v. Sill*, 85 Misc. 55.

**3340 n. 602.** Affidavit by managing clerk of attorney not sufficient. *Eyre v. Stubbart*, 71 Misc. 147, 128 N. Y. Supp. 4, 2 Civ. Pro. Rep. (N. S.) 176.

**3340 n. 604.** Justice other than the one who signed the disobeyed order may punish for contempt. *Ward v. Stoddard*, 144 App. Div. 143, 128 N. Y. Supp. 846. Where Municipal Court judgment in New York City became a Supreme Court judgment by filing a transcript, a motion to punish for violation of a New York City Court order must be made in the Supreme Court. *Landis Mach. Co. v. Willchinski*, 63 Misc. 24, 117 N. Y. Supp. 305. *Contra*, *Bridges v. Koppelman*, 63 Misc. 27, 117 N. Y. Supp. 306; *Katz v. Kosower*, 63 Misc. 25, 117 N. Y. Supp. 316.

**3340 n. 604a.** *Contra*, *Field v. White*, 102 App. Div. 365, 92 N. Y. Supp. 848.

**3344 n. 626.** Indorsement of dismissal on order held sufficient, and also held that if entry of order was necessary it was the duty of the judgment debtor. Consolidated

Agency Co. v. Townsley, 72 Misc. 155, 129 N. Y. Supp. 773.

**3344** n. 627. Abandonment of proceedings does not terminate unless order entered. *Westervelt v. Shapiro*, 132 N. Y. Supp. 338. Is pending until formally discontinued by order. Hence, if proceeding not adjourned after examination of debtor, testimony of witness subsequently taken must be filed. *Cowen v. William Bernard*, 80 Misc. 394, 141 N. Y. Supp. 252.

**3348** n. 658. But it does not necessarily follow that because the judgment debtor is a resident of an adjoining sister state and was then within said state, that he could not with reasonable diligence be served within the state of New York. *Matter of Darling*, 108 App. Div. 48, 95 N. Y. Supp. 492.

**3350** n. 667. See *Harding v. Conlon*, 138 N. Y. Supp. 1014. Where question of title raised. *Friedman v. Stein*, 138 N. Y. Supp. 928.

**3350** n. 671. A receiver should not be appointed where the proof shows that the judgment debtor has no property applicable to the payment of the judgment, and where it may result in harassing the debtor without any benefit accruing to the petitioner. *Matter of Stafford*, 105 App. Div. 46, 94 N. Y. Supp. 194.

**3351**. Receiver should not be appointed where interest of debtor under a will is a mere expectancy. *Matter of Lauter v. Hirsch*, 67 Misc. 165, 121 N. Y. Supp. 651.

**3351** n. 672. *Matter of Ryan v. Wagner*, 143 App. Div. 176, 127 N. Y. Supp. 973.

**3352**. Property must have been in possession of third person at the time of the issuance of the order for his examination. *Matter of Ridabock & Co. v. Scanlon*, 71 Misc. 505, 130 N. Y. Supp. 831.

**3363** § 2413. The order need not, in terms, exclude exempt property. *Seeley v. Connors*, 109 App. Div. 279,

95 N. Y. Supp. 1109. Order cannot require judgment debtor to execute and deliver an assignment and conveyance of his property. *Rourke v. Turrell*, 3 Civ. Pro. Rep. (N. S.) 15.

**3353** n. 692. Provision not authorized unless it appears from examination of debtor that he has such property. *Rourke v. Turrell*, 138 N. Y. Supp. 648.

**3355**. Technical defects in moving papers may be supplied nunc pro tunc. *Rourke v. Turrell*, 138 N. Y. Supp. 648. Variance in spelling of name of defendant in summons and judgment is not ground for setting aside. *Fisher v. Independent Brothers of Nieshweisher*, 84 Misc. 382, 147 N. Y. Supp. 390.

**3356** § 2414. If receiver has been irregularly appointed without notice but has not taken possession of any property, plaintiff may have his bond cancelled and his sureties discharged. *Wilhelm v. Hayman*, 126 N. Y. Supp. 374.

**3357** n. 713. Subsequent judgment creditor may obtain extension. *Matter of Walker*, 157 App. Div. 609, 142 N. Y. Supp. 972. Other creditors not entitled to benefit of receivership unless extended on their application. *Matter of Walker*, 157 App. Div. 609, 142 N. Y. Supp. 972 [rev. 80 Misc. 389, 141 N. Y. Supp. 265]. Exception to rule where two receiverships will not clash. *Harding v. Conlon*, 138 N. Y. Supp. 1014.

**3358** § 2417. Proceeding for discharge must be taken in court out of which execution issued. *People ex rel. Gollubier v. Lynch*, 72 Misc. 458, 129 N. Y. Supp. 885.

**3360** n. 730. *Denison v. Jackson Bros. Realty Co.*, 158 App. Div. 475, 143 N. Y. Supp. 586.

**3361** n. 743. *Contra*, *Heyl v. Taylor*, 64 Misc. 31, 117 N. Y. Supp. 916.

**3362** n. 745. Title does not cover property subsequently acquired until extended to it by an order duly made. *Matter of Walker*, 157 App. Div. 609, 142 N. Y. Supp. 972.

**3362** § 2422. Title relates back for benefit of judgment

creditor in whose behalf the proceeding is instituted but not for benefit of other creditors subsequently having the receivership extended for their benefit. *Hubbard v. J. P. Lewis Co.*, 128 App. Div. 416, 112 N. Y. Supp. 1050.

**3365.** A receiver obtains no title or interest in the debtor's right of possession of premises sold under execution, since until the sheriff's deed is delivered the debtor's right of possession is in the nature of an exemption. *Steenberge v. Low*, 46 Misc. 285, 289, 92 N. Y. Supp. 518. An award in condemnation proceedings takes the place of the land, so as to remain subject to the judgment lien on the land and payable to the receiver. *Van Loan v. City of N. Y.*, 94 N. Y. Supp. 221, affirming 45 Misc. 482, 92 N. Y. Supp. 734.

**3366 n. 771.** *Maples v. O'Brien*, 116 N. Y. Supp. 175.

**3366 § 2424.** Where a testamentary trust is void as to judgment creditors of the cestui que trust, an action to set it aside may be brought by the judgment creditors without joining their receiver in supplementary proceedings as a party plaintiff. *Ullman v. Cameron*, 186 N. Y. 339, 78 N. E. 1074 [affirming 105 App. Div. 159, 93 N. Y. Supp. 976]. A judgment against the executor of an estate cannot be enforced by the receiver. *Jones v. Arkenburgh*, 112 App. Div. 483, 98 N. Y. Supp. 532.

**3367.** Sale of debtor's interest under execution cuts off receiver's interest. *Bartkowiak v. Sampson*, 73 Misc. 446, 133 N. Y. Supp. 401. The receiver has not a sufficient title to sue for partition of real property. *Steenberge v. Low*, 46 Misc. 285, 92 N. Y. Supp. 518. The right of the receiver to recover an award for lands of the judgment debtor taken by condemnation proceedings is not limited to the ten years during which the judgment is a lien, but exists for the twenty years during which the judgment is in force. *Van Loan v. City of N. Y.*, 45 Misc. 482, 92 N. Y. Supp. 734 [affirmed, without ruling on this point, in 94 N. Y. Supp. 221].

**3367 n. 780.** *Hall v. Senior*, 54 Misc. 463, 106 N. Y. Supp.



29. See also *Van Loan v. New York*, 105 App. Div. 572, 94 N. Y. Supp. 221.

**3367** n. 781. *Matter of Damars*, 52 Misc. 532, 101 N. Y. Supp. 840.

**3368**. Receiver's contract for sale of personal property must be confirmed by court. *Matter of Hall v. Knott*, 69 Misc. 407, 125 N. Y. Supp. 299.

**3368** n. 788. Ten days' notice of the sale must be given. *Rawolle v. Kalbfleisch*, 47 Misc. 364, 94 N. Y. Supp. 16.

**3368** n. 790. Gross inadequacy of price is sufficient ground for setting aside the receiver's sale. *Rawolle v. Kalbfleisch*, 47 Misc. 364, 94 N. Y. Supp. 16.

**3370** n. 803. *Gilroy v. Everson-Hickok Co.*, 118 App. Div. 733, 103 N. Y. Supp. 620.

**3372**. The judgment debtor is not a necessary party to an action by his receiver to recover an award made in condemnation proceedings where the receiver was appointed before the award was made. *Fawcett v. New York*, 112 App. Div. 155, 98 N. Y. Supp. 286.

**3372** n. 818. May petition for removal of executors and for an accounting, where debtor has vested or contingent interest in the estate. *Matter of Kennedy*, 143 App. Div. 839, 128 N. Y. Supp. 626, 2 Civ. Pro. Rep. (N. S.) 312.

**3373**. Notice of a motion by a receiver for leave to sue should be given the party to be sued but actual notice of the application is equivalent. *Brady v. Shary*, 62 Misc. 236, 114 N. Y. Supp. 852.

**3374** n. 832. *Rabbe v. Astor Trust Co.*, 61 Misc. 650, 114 N. Y. Supp. 131.

**3374** n. 838. *Brady v. Shary*, 62 Misc. 236, 114 N. Y. Supp. 852.

**3375** § 2425. Cannot sue to recover salary garnisheed erroneously, where debtor had salary under twelve dollars a week. *Maged v. City of New York*, 75 Misc. 634, 133 N. Y. Supp. 969. An order permitting the receiver to open

and examine the contents of a safe deposit box standing in the joint names of the judgment debtor and another is not authorized. *Matter of Ehrich v. Root*, 134 App. Div. 432, 119 N. Y. Supp. 395. True owner of property in hands of receiver may bring replevin against the receiver, and it is no defense that the court has refused such relief on motion. *Humboldt Exploration Co. v. Fritsch*, 150 App. Div. 90, 134 N. Y. Supp. 747.

**3376** n. 848. An amendment of this Code provision in 1913 adds the following: "except where a receiver is appointed by the city court of the city of New York or a justice thereof, he is subject to the direction and control of the city court or a justice thereof."

## CHAPTER V

### JUDGMENT CREDITOR'S ACTION

**3383.** Section 1868 of the Code is now Cons. Laws, c. 13, § 28.

**3387** n. 23. Fraudulent intent must be shown. *Colnon v. Buckley*, 117 App. Div. 742, 102 N. Y. Supp. 912.

**3389** n. 37. See *McNeal v. Hayes Mach. Co.*, 118 App. Div. 130, 103 N. Y. Supp. 312.

**3389** n. 38. *Trotter v. Lisman*, 199 N. Y. 497, 92 N. E. 1052. Judgment is necessary. *Rubinsky v. Spiro*, 60 Misc. 582, 113 N. Y. Supp. 852.

**3390** n. 39. *Clinton v. South Shore Natural Gas & Fuel Co.*, 61 Misc. 339, 113 N. Y. Supp. 289; *Jewett v. Maytham*, 59 Misc. 56, 109 N. Y. Supp. 1000. Insolvency no excuse. *Trotter v. Lisman*, 199 N. Y. 497, 92 N. E. 1052.

**3390** n. 40. *Demuth v. Kemp*, 159 App. Div. 422, 144 N. Y. Supp. 690. But where, owing to the nonresidence of the defendant debtors, and to their lack of property other than the trust estate, the plaintiffs are without a remedy

at law, and cannot comply with the usual conditions precedent to the commencement of a suit in equity to reach equitable assets not liable to be levied on by execution, the recovery of a judgment and the return of an execution unsatisfied are not conditions precedent. *Bateman v. Hunt*, 46 Misc. 346, 94 N. Y. Supp. 861.

**3391** n. 47. *Kraemer v. Williams*, 131 App. Div. 236, 115 N. Y. Supp. 721.

**3391** n. 48. See also *Bateman v. Hunt*, 46 Misc. 346, 94 N. Y. Supp. 861.

**3393** n. 57. See *Lovejoy v. Chapin*, 115 N. Y. Supp. 947.

**3393** n. 61. The exception cannot be applied in the absence of requisite allegations bringing a case within the exception. *Egan v. Hagan*, 119 App. Div. 189, 104 N. Y. Supp. 247.

**3397** n. 89. In proper case, execution must be issued to county where judgment roll filed. *Demuth v. Kemp*, 159 App. Div. 422, 144 N. Y. Supp. 690.

**3399** § 2448. A judgment creditor, on discovering that the only property owned by his debtor is real estate situated in another state, cannot maintain a suit in equity in this state for the appointment of a receiver and a decree directing the debtor to convey to the receiver so that he may apply the proceeds in satisfaction of the judgment, unless he shows facts calling for the interposition of equity. The creditor must pursue the legal remedy afforded by the laws of the other state. *Heyl v. Taylor*, 137 App. Div. 641, 122 N. Y. Supp. 279.

**3401** § 2454. Trust property may be reached where the principal is payable to the cestui que trust on request. *Ullman v. Cameron*, 186 N. Y. 339 [affirming 105 App. Div. 159, 93 N. Y. Supp. 976].

**3401** n. 114. This Code provision does not prohibit the maintenance of a creditor's action to reach a vested remainder in a fund held in trust to receive the income and apply

it to the use of a person other than the debtor. *Bergmann v. Lord*, 194 N. Y. 70, 86 N. E. 828 [affirming mem. decision in 122 App. Div. 921, 107 N. Y. Supp. 1121, which affirmed 51 Misc. 213, 100 N. Y. Supp. 590].

**3402** n. 116. *Demuth v. Kemp*, 159 App. Div. 422, 144 N. Y. Supp. 690.

**3402** n. 117. See *Herts Bros. v. Tiffany*, 118 App. Div. 215, 102 N. Y. Supp. 1047.

**3403**. Alimony order cannot be attacked in an action by the creditor of the husband to subject trust income to the creditor's claim. *Demuth v. Kemp*, 159 App. Div. 422, 144 N. Y. Supp. 490 [rev. on other grounds 79 Misc. 516, 140 N. Y. Supp. 152].

**3403** n. 127. *Demuth v. Kemp*, 159 App. Div. 422, 144 N. Y. Supp. 690. See also *Raymond v. Tiffany*, 59 Misc. 283, 112 N. Y. Supp. 252.

**3403** n. 128. *Demuth v. Kemp*, 159 App. Div. 422, 144 N. Y. Supp. 490.

**3406** § 2465. Where the insured has the right under the policy to change the beneficiary, such dominion over the policy makes it property which can be reached by his creditors. *Cavagnaro v. Thompson*, 78 Misc. 687, 138 N. Y. Supp. 819.

**3407** § 2468. See *Holland v. Grote*, 193 N. Y. 262, 86 N. E. 30 [reversing in part on other grounds 107 N. Y. Supp. 667]. In action for discovery, property not specifically set forth in the complaint may be reached. Otherwise where complaint specifies certain property and alleges that there is no other property. *Koellhofer v. Petersen*, 82 Misc. 180, 143 N. Y. Supp. 353.

**3408** n. 160. Either to sheriff of county where debtor resides, or, if he resides out of the state, to the sheriff of the county where he has an office for the regular transaction of business. *Pendleton v. Friedman*, 135 App. Div. 420, 119 N. Y. Supp. 994.

**3409** n. 162. *West Shore Furniture Co. v. Murphy*, 141 N. Y. Supp. 835.

**3409** n. 166. See also *Holland v. Grote*, 125 App. Div. 413, 109 N. Y. Supp. 787.

**3409** n. 167. But see *Calkins v. Stedman*, 146 App. Div. 202, 130 N. Y. Supp. 932.

**3410** § 2469. It is no defense that the judgment on which the action is based was obtained by perjury. *Gitler v. Russian Co.*, 55 Misc. 553, 106 N. Y. Supp. 886.

**3414** § 2474. See *City Equity Co. v. Elm Park Realty Co.*, 135 App. Div. 856, 120 N. Y. Supp. 437.

**3415** n. 204. But the first assignee is not a necessary party where the action is merely to assert a lien upon property transferred through two successive assignees. *McNeal v. Hayes Mach. Co.*, 118 App. Div. 130, 103 N. Y. Supp. 312.

**3417** n. 216. See also *Wahlheimer v. Truslow*, 106 App. Div. 73, 94 N. Y. Supp. 137.

**3418** n. 217. But it is not necessary to file a *lis pendens* to create a lien though the judgment debtor is discharged in bankruptcy after the commencement of the action, where no trustee in bankruptcy has been appointed. *Wahlheimer v. Truslow*, 94 N. Y. Supp. 137.

**3418** n. 222. *Wahlheimer v. Truslow*, 106 App. Div. 73, 94 N. Y. Supp. 137.

**3420** n. 230. *Wahlheimer v. Truslow*, 106 App. Div. 73, 94 N. Y. Supp. 137.

**3421** n. 235. This Code provision is now Cons. Laws, c. 23, § 102.

**3425** n. 265. The form and detail of the decree is in the discretion of the trial court. *Bergmann v. Lord*, 194 N. Y. 70, 86 N. E. 828 [affirming mem. decision in 122 App. Div. 921, 107 N. Y. Supp. 1121].

**3426** § 2492. Personal judgment, see *Koellhofer v. Petersen*, 82 Misc. 180, 143 N. Y. Supp. 353.

**3428.** Where there is only one plaintiff and his claim can

be satisfied by making the judgment applicable to a particular sum of money sufficient to satisfy it, it is not necessary that all the fraudulent transfers of personal property be set aside. *Fox v. Erbe*, 100 App. Div. 343, 348, 91 N. Y. Supp. 832.

**3429 n. 292.** Where no accounting is necessary in a suit by one creditor to set aside a fraudulent assignment by the debtor of all his property, a money judgment is proper. *Wahlheimer v. Truslow*, 106 App. Div. 73, 94 N. Y. Supp. 137.

**3432 § 2498.** Section 7 of the Personal Property Law applies only to transfers made by the decedent himself. *Magoun v. Quigley*, 115 App. Div. 226, 100 N. Y. Supp. 1037. The statute does not affect the manner in which the claim must be established. *Mertens v. Mertens*, 48 Misc. 235, 96 N. Y. Supp. 785.

**3433 § 2499.** Necessity for prior demand on debtor's executor to bring the suit, see *Calkins v. Stedman*, 146 App. Div. 202, 130 N. Y. Supp. 932.

**3435 § 2502.** Neither the executor of the deceased debtor nor his legal representatives need be made parties where the complaint shows that no executor was appointed and that the deceased died insolvent. *Johnston v. Gundberg*, 113 App. Div. 228, 98 N. Y. Supp. 1015.

## CHAPTER VI

### SEQUESTRATION PROCEEDINGS

No New Matter Has Been Found for This Chapter



# BOOK II

## APPELLATE PRACTICE

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### PART I

#### APPEALS IN GENERAL

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#### CHAPTER I

##### NATURE AND FORM OF REMEDY

No New Matter Has Been Found for This Chapter

#### CHAPTER II

##### JUDGMENTS AND ORDERS APPEALABLE

**3591** § 2508. The Code provisions relating to appeals from Surrogates' Courts, are now, under the 1914 amendments, §§ 2754-2764 of the Code.

**3594** n. 9. *Belfer v. Ludlow*, 144 App. Div. 746, 129 N. Y. Supp. 626.

**3597** n. 33. May be abridged or taken away during the pendency of the action. *Buffalo Grain Co. v. Ryan Elevating, etc., Co.*, 68 Misc. 19, 123 N. Y. Supp. 80.

**3597** n. 35. *Matter of Commissioner of Public Works*, 135 App. Div. 561, 120 N. Y. Supp. 930.



**3602.** An unnecessary order on a ruling dismissing the complaint as to the moving codefendant is not appealable. *Abrashkov v. Ryan*, 130 App. Div. 429, 114 N. Y. Supp. 973.

**3602 n. 2.** Mere memorandum, not made a part of the order entered, is not appealable. *Gaskell v. Nolte*, 138 App. Div. 875, 123 N. Y. Supp. 442.

**3602 n. 5.** *Barron v. Feist*, 122 App. Div. 687, 107 N. Y. Supp. 494. *Contra.* A judgment void for want of jurisdiction cannot be appealed from. *Evers v. Gould*, 55 Misc. 266, 105 N. Y. Supp. 150.

**3603 n. 6.** *Stewart v. Stewart*, 127 App. Div. 672, 111 N. Y. Supp. 736.

**3604 § 2524.** Where order has been abrogated by resettled order, appeal must be from resettled order. *Pepe v. Curti*, 114 N. Y. Supp. 415; *Dewsnap v. Matthews*, 119 App. Div. 167, 104 N. Y. Supp. 330. Where an order appealed from is thereafter resettled so as to materially change it, the appeal should be dismissed where no notice of appeal was served from the resettled order. *Dewsnap v. Matthews*, 119 App. Div. 167, 104 N. Y. Supp. 330.

**3604 n. 18.** *Contra*, *Lake v. Lake*, 124 App. Div. 89, 108 N. Y. Supp. 964.

**3605 n. 20.** An appeal will not be entertained merely to give instruction. *Hollis v. Brooklyn Heights R. Co.*, 121 App. Div. 575, 106 N. Y. Supp. 197.

**3607 n. 34.** *Whalen v. Stuart*, 194 N. Y. 495, 87 N. E. 819.

**3609 § 2534.** Under the provisions of section 1355 of the Code of Civil Procedure an order made by the Appellate Division on an appeal must be first entered in the office of the clerk of that court, who transmits a certified copy thereof to the clerk of the county where the judgment was entered, and upon such certified copy of the order and on the papers upon which the appeal was heard such county

clerk enters judgment which is the judgment of the Appellate Division, and an appeal is properly taken therefrom to this court. It is not necessary to appeal from the order upon which the judgment was entered. *Dwight v. Gibb*, 208 N. Y. 153, 101 N. E. 851 [aff. 150 App. Div. 573, 135 N. Y. Supp. 401].

**3609** § 2535. Order appointing a referee to take testimony and report as to a claim for services against a city is not appealable to the Court of Appeals. *Matter of Van Kleeck*, 208 N. Y. 594, 102 N. E. 1116.

**3610** § 2536. A partition judgment is final as to defendant so as to be appealable where it determines adversely the interest claimed by defendant, although it is interlocutory as between the parties. *Brown v. Feek*, 204 N. Y. 238, 97 N. E. 526. Where there was an appeal to the Appellate Division from an order denying a motion for a new trial as well as an appeal from the judgment, and while the judgment was reversed the order of reversal does not show an affirmance so far as the facts were concerned, the Court of Appeals has no jurisdiction. *Caldwell v. New York*, 210 N. Y. 50 [foll. *Wright v. Smith*, 209 N. Y. 249].

**3610** n. 54. *Vose v. Conkling*, 159 App. Div. 201, 144 N. Y. Supp. 1.

**3612** n. 69. An Appellate Division order affirming a Municipal Court judgment is not appealable until a judgment is entered on the order. *Moore v. Board of Education of City of New York*, 88 N. E. 645. See also ante, **3609** § 2534.

**3612** n. 72. An order of the Appellate Division dismissing an appeal from an order amending a judgment is not appealable to the Court of Appeals. *Van Nostrand v. Van Nostrand*, 125 App. Div. 718, 110 N. Y. Supp. 142.

**3613** n. 77. See *McNamara v. Goldan*, 194 N. Y. 315, 87 N. E. 440 [affirming mem. decision in 122 App. Div. 922, 108 N. Y. Supp. 1139]. Applies only where there has been

an "affirmance" of an interlocutory judgment. *Will v. Barnwell*, 197 N. Y. 298, 90 N. E. 817, 2 Civ. Pro. (N. S.) 27. If the Appellate Division reverses an order granting a new trial, it is in effect the refusal of a new trial, within this Code provision, so as to be appealable. *Will v. Barnwell*, 197 N. Y. 298, 90 N. E. 817, 2 Civ. Pro. (N. S.) 27; *Girling v. New York*, 197 N. Y. 302, 90 N. E. 818, 2 Civ. Pro. (N. S.) 25.

**3613** n. 78. Code provision applies only in case of affirmance of interlocutory judgment. *Will v. Barnwell*, 197 N. Y. 298, 90 N. E. 817, 2 Civ. Pro. Rep. (N. S.) 27.

**3613** § 2538. Order discharging a receiver held appealable. *Conlon v. Kelly*, 199 N. Y. 43, 92 N. E. 109. Order denying a motion to cancel a judgment against a bankrupt is a final one in a special proceeding so as to be appealable. *Guasti v. Miller*, 203 N. Y. 259, 96 N. E. 416. The right to appeal from an order disbarring an attorney is not taken away by the 1912 amendment of the Judiciary Law. *Matter of Robinson*, 209 N. Y. 354, 103 N. E. 160.

**3614**. An order of the Appellate Division affirming an order of the Special Term, which vacated a former order appointing a trustee under a will in place of a deceased trustee, is a final order in a special proceeding and, therefore, may be appealed to the Court of Appeals. *Matter of Earnshaw*, 196 N. Y. 330. An order made in an action, to regulate and enforce rights determined by the judgment therein, is not an order in a special proceeding so as to be appealable. *Rudiger v. Coleman*, 206 N. Y. 412, 99 N. E. 1049.

**3614** n. 80. *Steinman v. Conlon*, 208 N. Y. 198, 101 N. E. 863; *Matter of Sherrill*, 188 N. Y. 185. This applies to an appeal from an order distributing surplus moneys after foreclosure notwithstanding the order is entitled in the original action. *Velleman v. Rohrig*, 193 N. Y. 439, 86 N. E. 476 [affirming 127 App. Div. 692, 111 N. Y. Supp. 736]. Statute giving right to appeal generally in certain condemnation pro-

ceedings construed as not intending to authorize an appeal as of right from an intermediate order. *Matter of Simmons*, 206 N. Y. 577, 100 N. E. 455.

**3614** n. 84. Application to Supreme Court for payment of income under the trust, after dismissal of complaint in action by beneficiary to remove trustees and for an accounting, is a special proceeding so that affirmance by Appellate Division is appealable. *Matter of Ungrich*, 201 N. Y. 415, 94 N. E. 999. Proceeding for removal of a city magistrate is not a special proceeding. *Matter of Droege*, 197 N. Y. 44, 90 N. E. 340. Application to compel a defaulting purchaser at a foreclosure sale to execute a deed to a purchaser on a resale is not a special proceeding. *Knickerbocker Trust Co. v. Oneonta, etc., R. R. Co.*, 197 N. Y. 391, 90 N. E. 1111. "In the determination of this fundamental question we are preliminarily led to inquire whether the proceeding to punish appellant for contempt is to be regarded as a step incidental to and taken in the supplementary proceedings or as a special proceeding of and by itself, for if the latter be its status there might be much reason for regarding the order punishing for contempt as a final one. This preliminary question is not free from an apparent conflict of authorities. Such authorities, however, as *Sudlow v. Knox* (7 Abb. [N. S.] 411) and *Erie Ry. Co. v. Ramsey* (45 N. Y. 637), holding that contempt proceedings are independent special proceedings, may be distinguished because of the subsequent adoption of section 2273 of the Code of Civil Procedure (now Judiciary Law, Cons. Laws, ch. 29, sections 760, 761), which provides as follows: 'An order to show cause may be made, either before or after the final judgment in the action, or the final order in the special proceeding. It is equivalent to a notice of motion; and the subsequent proceedings thereupon are taken in the action or special proceeding, as upon a motion made therein.' And of the later cases decided since the adoption of this provision and holding that a proceeding to

punish for contempt is to be regarded as an independent special proceeding and now cited (*Matter of Strong v. Randall*, 177 N. Y. 400; *Matter of Depue*, 185 N. Y. 60; *Matter of King v. Ashley*, 179 N. Y. 281), two may be clearly distinguished from the present one by the fact that the contempt proceeding then under review was directed against one who was merely a witness in, and thus a stranger rather than a party to, the primary special proceeding or action, and the decision in the remaining case undoubtedly proceeded on that theory. The view that this proceeding is to be regarded as taken in the special proceeding to which it relates and in which it was entitled, and not as an independent special proceeding, is amply sustained." *Matter of Steinman*, 208 N. Y. 198, 201, 101 N. E. 863.

**3615.** "A special proceeding may be said to be finally determined when an order has been made dismissing it or adjudicating the rights of the various parties to the relief sought." *Matter of Steinman*, 208 N. Y. 198, 203, 101 N. E. 863. Order denying motion to vacate a subpoena duces tecum, issued under § 915 of the Code relating to taking of depositions within the state for use without the state, is appealable as a final order in a special proceeding. *Matter of Mohawk Overall Co.*, 210 N. Y. 474. Order of Appellate Division affirming an order vacating an ex parte order continuing a mechanic's lien is final so as to be appealable. *Matter of Manton*, 206 N. Y. 742, 100 N. E. 1129. Order directing the distribution of funds in proceedings for the liquidation of a trust company is appealable. *Matter of Carnegie Trust Co.*, 206 N. Y. 390, 99 N. E. 1096. Order adjudging a judgment debtor in contempt for failure to appear in supplementary proceedings is not an order "finally determining" the supplementary proceedings. *Steinman v. Conlon*, 208 N. Y. 198, 101 N. E. 863. An order of the Appellate Division granting a new trial in a special proceeding in a Surrogate's Court is not appealable to the Court of Appeals as of right

since not a final order in a special proceeding. *Matter of Gibson*, 195 N. Y. 466. Order sustaining a writ of certiorari and directing that application be referred back to a commission for action within the limits of its authority is not final so as to be appealable. *People ex rel. Long Acre, etc., v. Public Service Comm.*, 199 N. Y. 254, 92 N. E. 629.

**3615** n. 92. *People ex rel. Duryee v. Duryee*, 188 N. Y. 440 (order of Appellate Division dismissing habeas corpus proceeding).

**3616.** Order in condemnation proceedings directing repayment of money by claimant held a final order. *Matter of New York (Finnegan's Appeal)*, 209 N. Y. 127, 102 N. E. 638. Order in condemnation proceedings denying motion to amend map and petition therefor held an intermediate order. *Matter of Simmons*, 206 N. Y. 577, 100 N. E. 455.

**3617** § 2539. The orders granting new trials on exceptions, of which a review is permitted by the Court of Appeals, where the appellants stipulate for judgment absolute in the event of affirmance, are only such as grant new trials in "actions," and do not include orders granting new hearings in special proceedings. *Matter of Gibson*, 195 N. Y. 466. Practice of appealing where record shows that questions of fact as well as of law, were presented, disapproved. *Merkel v. Lazard*, 139 App. Div. 624, 124 N. Y. Supp. 140.

**3617** n. 105. Where a judgment and an order denying a new trial on the minutes based on all the Code grounds were reversed by the Appellate Division and a new trial granted because defendant's motion at the close of the evidence to dismiss because of its insufficiency should have been granted, the order of reversal is not appealable to the Court of Appeals. *Brennan v. New York*, 123 App. Div. 7, 107 N. Y. Supp. 455.

**3617** n. 106. *McGovern v. Manhattan R. Co.*, 112 App. Div. 184, 98 N. Y. Supp. 97; *Duryea v. Zimmerman*, 123

App. Div. 805, 108 N. Y. Supp. 548 (where rule is fully stated).

**3619** n. 116. *Buffalo v. Stevenson*, 207 N. Y. 258, 100 N. E. 798.

**3619** n. 117. *Floyd-Jones v. Schann*, 203 N. Y. 568.

**3620** n. 122a. See *Seaward v. Davis*, 198 N. Y. 415, 91 N. E. 1107. Question cannot be certified where appeal lies as of right. *People ex rel. Bingham v. State Water Supply Comm.*, 155 App. Div. 947, 140 N. Y. Supp. 1138.

**3621**. The Court of Appeals cannot control the right or form of certification of appeals by the Appellate Division although it can decline to answer questions certified and frequently does so. *Callahan v. Keeseville, etc., R. Co.*, 199 N. Y. 268, 92 N. E. 747 [rev. 131 App. Div. 306].

**3621** n. 124. Moot questions will not be answered. *Woodruff v. People*, 193 N. Y. 560, 86 N. E. 562 [reversing mem. decision in 127 App. Div. 934, 111 N. Y. Supp. 1150].

**3621** n. 131. A party by availing himself of leave to appeal from an interlocutory judgment waives, not temporarily, but finally, the right to any review of such judgment, except as can be had by virtue of the questions certified. An appeal from the final judgment in such case brings up no question relating to the interlocutory judgment. *Callahan v. Keeseville, etc., R. Co.*, 199 N. Y. 268, 269, 92 N. E. 747 [rev. 131 App. Div. 306].

**3622** § 2542. It seems, on such an appeal, contrary to the suggestion in the text, that question cannot be certified. *Swam v. Inderlied*, 187 N. Y. 372.

**3623** § 2543. Whether an appeal will lie to the Court of Appeals will not be determined, but questions will be certified. *Springs v. James*, 137 App. Div. 669, 122 N. Y. Supp. 476.

**3623** n. 137. Appeal allowed where judges differed on prior appeals. *Grant v. National Ry. Spring Co.*, 138 App. Div. 911, 122 N. Y. Supp. 1130.

**3623** n. 139. Action to recover damages for the unauthorized use of plaintiff's photograph for advertising purposes is one for a personal injury. *Riddle v. MacFadden*, 201 N. Y. 215, 94 N. E. 644.

**3624**. What is judgment of affirmance, see *McNamara v. Goldan*, 194 N. Y. 315, 87 N. E. 440 [affirming mem. decision in 122 App. Div. 922, 108 N. Y. Supp. 1139].

**3624** n. 140. The character of the action is determined by the complaint. *Gadski-Tauscher v. Graff*, 184 N. Y. 559.

**3624** n. 145. Decision is unanimous although part of justices concur in result only. *MacArdell v. Olcott*, 189 N. Y. 368, 82 N. E. 161.

**3626** § 2545. But interlocutory judgment cannot be reviewed after account taken, where it has already been affirmed both in the Appellate Division and the Court of Appeals on a direct appeal. *Seaward v. Davis*, 148 App. Div. 805, 133 N. Y. Supp. 384, 3 Civ. Pro. (N. S.) 66.

**3626** n. 155. What constitutes interlocutory judgment as distinguished from order, see *Saal v. South Brooklyn R. Co.*, 122 App. Div. 364, 106 N. Y. Supp. 996.

**3626** n. 157. *Contra*, *Furniss v. Furniss*, No. 1, 148 App. Div. 211, 133 N. Y. Supp. 535.

**3626** n. 158. *Smith v. Thompson*, 118 App. Div. 6, 103 N. Y. Supp. 336; *Rees v. New York Herald Co.*, 112 App. Div. 456, 98 N. Y. Supp. 548; *Gansevoort Bank v. Empire State Surety Co.*, 112 App. Div. 500, 98 N. Y. Supp. 382.

**3626** § 2546. In second department, however, appeal cannot be taken from Appellate Term to Appellate Division. *Leach v. Anwell*, 154 App. Div. 170, 138 N. Y. Supp. 975. If no stipulation for judgment absolute, where necessary, appeal will be dismissed. *Lordi v. People's Surety Co., etc.*, 143 App. Div. 477, 128 N. Y. Supp. 481. No appeal lies to the Appellate Division from an order dismissing an appeal



from the City Court on a motion originating in the Appellate Term. *Gersman v. Levy*, 126 App. Div. 83, 110 N. Y. Supp. 236.

**3626** n. 159. Appeal is from determination of Appellate Term and not from judgment of the City Court. *Webster v. Abbott*, 69 Misc. 309, 125 N. Y. Supp. 635. A Special Term of the Supreme Court has no power, on motion pending application for leave to appeal to the Appellate Division, to stay a judgment entered in the City Court of New York and affirmed by the Appellate Term, where judgment of affirmance has been entered in the City Court. *Stern v. Barrett Chemical Co.*, 124 App. Div. 377, 108 N. Y. Supp. 811.

**3628** § 2550. An order made on notice, directing that exceptions be heard in the first instance at the Appellate Division, is appealable without a motion to set it aside. *Babad v. Colton Dental Ass'n*, 150 App. Div. 561, 135 N. Y. Supp. 555. An order denying a new trial is appealable although an appeal has also been taken from the judgment, and notwithstanding the right to serve a proposed case has been waived. *Gelder v. International Ore, etc., Co.*, 148 App. Div. 637, 133 N. Y. Supp. 214.

**3629** n. 173. Appeal may be from denial of motion for a new trial after dismissal of the complaint, and incidentally for a reversal of a directed verdict for defendant, although no appeal is taken from the judgment. *Callahan v. Munson S. S. Line*, 141 App. Div. 791, 126 N. Y. Supp. 538. And it is immaterial that the order is not entered until after the time within which to appeal from the judgment. *Howe v. Noyes*, 48 Misc. 356, 95 N. Y. Supp. 542.

**3631** § 2552. An order denying a motion for leave to renew a motion upon new affidavits is appealable. *Conlen v. Rizer*, 109 App. Div. 537, 96 N. Y. Supp. 566. An order on a motion in effect one for leave to renew a motion on additional papers is appealable to the Appellate Division.

New York v. Montague, No. 2, 149 App. Div. 601, 134 N. Y. Supp. 89.

**3631** n. 184. However, details of practice which are discretionary, are not appealable where not affecting substantial rights. *McMasters v. Allcutt*, 151 App. Div. 559, 136 N. Y. Supp. 144.

**3631** n. 185. It is immaterial that subsequently an interlocutory and final judgment was entered. *Feist v. Weingarten Bros.*, 111 N. Y. Supp. 848. Where two orders prepared by opposing parties are inadvertently entered and the judge destroys one, an order denying a motion to have the destroyed order filed and entered does not affect a substantial right. *Hill v. Miller*, 53 Misc. 255, 103 N. Y. Supp. 94.

**3631** n. 193. *Harding v. Conlon*, 146 App. Div. 842, 131 N. Y. Supp. 903. Rules applied to appeal from City Court of New York to Appellate Term. *Romeas v. Boettger*, 120 N. Y. Supp. 754.

**3631** n. 194. *Twelfth Ward Bank v. Columbia Pub. Co.*, 51 Misc. 62, 99 N. Y. Supp. 908. Contra, *Matter of Radam Microbe Killer Co.*, 114 App. Div. 199, 99 N. Y. Supp. 925. A judgment can be corrected by appeal therefrom and not on appeal from an order denying a motion to resettle it. *Burnstine v. Burnstine*, 157 App. Div. 905, 142 N. Y. Supp. 342.

**3633**. An order made at the opening of the trial denying a motion to dismiss the complaint for failure to state a cause of action is not appealable. *Loughlin v. Wocker*, 152 App. Div. 466, 137 N. Y. Supp. 257.

**3633** n. 212. *German Nat. Bank v. Queen*, 159 App. Div. 236, 144 N. Y. Supp. 195; *Smith v. Thompson*, 118 App. Div. 6, 103 N. Y. Supp. 336.

**3634** n. 222. An order denying a reserved motion for direction of a verdict, applied for before but not decided until after the disagreement of the jury. *Kingsway Con-*

struction Co. v. Met. Life Ins. Co., 161 App. Div. 649, 146 N. Y. Supp. 883.

**3634** n. 223. So an order allowing interrogatories is appealable. *Shafer v. McIntyre*, 116 App. Div. 87, 101 N. Y. Supp. 268.

**3635** n. 234. But it is otherwise as to an order denying a motion to strike a case from a particular calendar in the Supreme Court. *Standard Finance Co. v. Hollins*, 125 App. Div. 894, 110 N. Y. Supp. 816.

**3636**. Order denying motion to strike from the record a provision allowing costs is not appealable. The remedy is to move to retax and if that is denied to appeal from the judgment. *Equitable Trust Co. v. Kirchhoff*, 140 N. Y. Supp. 373.

**3636** n. 239. Order denying a motion to set aside a judgment by default is not appealable. *Glenns Falls Ins. Co. v. Extension Development Co.*, 154 App. Div. 305, 138 N. Y. Supp. 939.

**3637** n. 248. An order dismissing the complaint for non-compliance with an order for discovery is appealable. *Banes v. Rainey*, 130 App. Div. 465, 114 N. Y. Supp. 986.

**3638** n. 257. Order adjudging a witness in contempt in supplementary proceedings for failure to answer questions is appealable on the ground that the contempt proceedings are a "civil" special proceeding. *Matter of Hanbury*, 160 App. Div. 662, 145 N. Y. Supp. 1126.

**3638** n. 257b. See *In re City of New York*, 131 App. Div. 767, 116 N. Y. Supp. 353.

**3640** n. 259. *People ex rel. Mt. Vernon Trust Co. v. Millard*, 127 App. Div. 77, 111 N. Y. Supp. 22. This rule is abrogated by an amendment of section 1356 of the Code in 1913 by adding the following provision: "An appeal may also be taken to the Appellate Division of the Supreme Court from an order granting or denying an application for

an alternative writ of mandamus or an alternative writ of prohibition.”

**3641** § 2559. See *Matter of Ives*, 155 App. Div. 670, 140 N. Y. Supp. 694. Order vacating award held appealable. *Matter of Simmons*, 203 N. Y. 241, 96 N. E. 456.

**3642** § 2560. “An order granting or denying an application for an alternative writ or prohibition, and a final order, made as prescribed in the last section, can be reviewed only by appeal.” This was added by amendment to § 2101 of the Code in 1913. See also *ante*, **3640** n. 259.

**3644** § 2563. Appeals from Municipal Courts, see *Leach v. Anwell*, 154 App. Div. 170, 138 N. Y. Supp. 975.

**3644** n. 284. This case is overruled in *Barrus v. Parsons*, 109 App. Div. 634, 96 N. Y. Supp. 359, in so far as appeals from special proceedings, including summary proceedings, are concerned.

**3645** n. 287. *Fox v. Fox*, 128 App. Div. 876, 113 N. Y. Supp. 121.

**3646** n. 296. Does not apply when statute makes order of County Court “final and conclusive.” In *re Village of Cedarhurst*, 121 App. Div. 576, 106 N. Y. Supp. 275.

**3647** n. 299. The contrary to the rules stated in the text is now the law. *Soop v. Burhans*, 183 N. Y. 227 [reversing 106 App. Div. 341, 94 N. Y. Supp. 463].

**3647** § 2568. Under 1910 amendment of Municipal Court Act authorizing appeals direct to the Appellate Division in the second department, if it shall so direct, a second appeal to the Appellate Division cannot be taken after one had before an Appellate Term designated by it for the hearing of the appeal. *Leach v. Huwell*, 154 App. Div. 170, 138 N. Y. Supp. 975. While inquests are not trials, a judgment thereon is appealable by defendant where he objected to evidence and took exceptions to the rulings and also excepted to the direction of verdicts. *Fisher v. South Shore Traction Co.*, 70 Misc. 529, 127 N. Y. Supp. 333.

**3648** § 2569. Order declaring appeal from judgment abandoned by failure to serve a case held appealable as impairing a substantial right. *Levine v. Proser*, 83 Misc. 134, 144 N. Y. Supp. 746.

**3648** n. 305. See also ante, **3631** n. 193

## CHAPTER III

### WHO MAY APPEAL

**3649** § 2570. A party cannot appeal from an order entered on his own motion. *Josias v. Nivois*, 107 N. Y. Supp. 19; *Oppenheimer v. Demuth Glass Mfg. Co.*, 56 Misc. 459, 107 N. Y. Supp. 29; *McAlpin v. Stoddard*, 54 Misc. 647, 105 N. Y. Supp. 9.

**3650**. A party is "aggrieved" where his personal constitutional right is about to be invaded. *Matter of Ehrich v. Root*, 134 App. Div. 432, 119 N. Y. Supp. 395.

**3650** n. 2. *Horton v. Thos. McNally Co.*, 155 App. Div. 332, 140 N. Y. Supp. 357 [aff. 139 N. Y. Supp. 643]; *Matter of Hotchkiss*, 138 App. Div. 877, 880, 123 N. Y. Supp. 511, 512; *People v. Simpson*, 121 App. Div. 402, 21 Crim. R. 458, 106 N. Y. Supp. 45; *In re Brooks*, 119 App. Div. 780, 104 N. Y. Supp. 670. Appeal by one in his individual capacity not authorized where the only injury was to him as a representative. *Heist v. Heist*, 139 App. Div. 712, 124 N. Y. Supp. 462.

**3650** n. 4. See also *Matter of Kenney*, 153 App. Div. 325, 137 N. Y. Supp. 1097.

**3651**. Failure to put in a defense, but cross-examining witnesses, held not to make a judgment one by default. *Hirsch v. Military-Naval Corp.*, 138 N. Y. Supp. 1076. Judgment when defendant prevented by erroneous ruling from presenting his defense, and against which he protested, held not a default. *Bromberger v. Worth*, 80 Misc. 502, 141 N. Y. Supp. 569. The remedy is by motion to open the

default or to vacate the judgment as entered without jurisdiction. *Frising v. Cofinas*, 142 N. Y. Supp. 356.

**3651** n. 15. *Stern v. Marcuse*, 128 App. Div. 169, 112 N. Y. Supp. 653; *G. W. Jones Lumber Co. v. Fulton*, 123 App. Div. 386, 107 N. Y. Supp. 942; *Levine v. Munchik*, 51 Misc. 556, 101 N. Y. Supp. 14. Waiver of service of the complaint, by a codefendant who appears generally and demands service of all other papers, and failure to answer or to attend at the trial, does not make the judgment one by default as against him, where his sole interest was as to the form of the judgment. *Silverstein v. Brown*, 153 App. Div. 677, 138 N. Y. Supp. 848.

**3651** n. 17. See also *Wolter v. Liebmann*, 52 Misc. 517, 102 N. Y. Supp. 487. Default order is not appealable. *Matter of Hotchkiss*, 138 App. Div. 877, 880, 123 N. Y. Supp. 511, 512. Applies where trustee made himself a defendant as an individual and then defaulted as defendant. *Dwight v. Gibb*, No. 1, 145 App. Div. 223, 129 N. Y. Supp. 961.

**3652**. Order granting a motion but which is practically equivalent to a denial thereof, because of the terms imposed, is appealable by the successful party. *Schrenk & Co. v. Gurfein*, 140 N. Y. Supp. 520.

**3652** n. 24. Judgment entered on refusal to plead over is final and appealable. *Miles v. Weisbecker*, 78 Misc. 369, 138 N. Y. Supp. 424.

**3652** nn. 24, 25. To same effect, see *Furniss v. Furniss*, No. 2, 148 App. Div. 217, 133 N. Y. Supp. 46.

**3652** n. 27. *Brown v. McKie*, 185 N. Y. 303. An order opening a default is not appealable by the successful party who objects to the terms imposed. *Wadler v. Karpel*, 78 Misc. 376, 138 N. Y. Supp. 367.

**3653**. One of several joint defendants may appeal alone. *Electrical Accessories Co. v. Mittenthal*, 146 App. Div. 647, 131 N. Y. Supp. 433.

**3654** n. 43. *Matter of Kelly*, 153 App. Div. 322, 137 N. Y. Supp. 1099. Executor is a party aggrieved, however, where judgment annuls the probate of the will. *Matter of Cavanaugh*, 72 Misc. 584, 131 N. Y. Supp. 982.

**3655** n. 48. *Compare Ghersin v. Thuor*, 56 Misc. 465, 107 N. Y. Supp. 195.

**3656**. Receiver removed by order is a party aggrieved so as to be authorized to appeal therefrom. *Flinn v. Hanbury*, 157 App. Div. 207, 141 N. Y. Supp. 844.

**3656** n. 57. See *Fitch v. Hay*, 112 App. Div. 736, 98 N. Y. Supp. 1090. But not after he has ceased to occupy the office, he having no individual interest in the controversy. *People ex rel. Walker v. Ahearn*, 200 N. Y. 146, 93 N. E. 472.

**3658** n. 72. See *Ziegler v. George Schleicher Co.*, 56 Misc. 582, 107 N. Y. Supp. 85.

**3658** n. 73. The owners of the equity of redemption of which a receiver has been appointed may appeal from an order denying them leave to come in as parties defendant. *Dewsnap v. Matthews*, 53 Misc. 48, 103 N. Y. Supp. 902.

**3659** n. 81. See *Agricultural Ins. Co. v. Smith*, 112 App. Div. 840, 98 N. Y. Supp. 347 (holding that the attorney may appeal in the client's name where the relation still exists and they are not hostile, and the order appealed from also binds the attorney).

## CHAPTER IV

### WAIVER OF RIGHT TO APPEAL

**3663** § 2576. Party cannot appeal from order inadvertently entered on his own motion. *Harris v. St. Paul Fire, etc., Co.*, 126 N. Y. Supp. 118. Consent to submission of certain issues to the jury does not waive the right to appeal on the ground that the finding of the jury should be set aside on any of the grounds stated in section 999 of the Code.

Gerson v. Blanck, 79 Misc. 24, 139 N. Y. Supp. 47. Where judgment entered subject to plaintiff's exception, upon failure to pay costs as awarded by order of discontinuance and according to the terms of such order, it was not a consent judgment. Kumin v. United Waste Mf'g Co., 153 App. Div. 498, 138 N. Y. Supp. 82.

**3663** n. 11. Carmichael v. John Hancock Mut. Life Ins. Co., 49 Misc. 461, 97 N. Y. Supp. 976.

**3668** n. 45. Silver & Co. v. Waterman, 127 App. Div. 339, 111 N. Y. Supp. 546; Applebaum v. Bonagur, 56 Misc. 615, 107 N. Y. Supp. 635.

**3668** n. 46. But the obtaining and inserting in the judgment taxable costs and allowances does not waive the right to appeal. Smith v. Havens Relief Soc., 115 App. Div. 185.

**3668** § 2583. The right to appeal from an order striking out portions of an answer is not waived by proceeding to trial. Becker v. Colonial Life Ins. Co., 153 App. Div. 382, 138 N. Y. Supp. 491 [aff. 75 Misc. 213, 133 N. Y. Supp. 481].

**3669** n. 57. Kemp v. Tonnele Co., 51 Misc. 49, 99 N. Y. Supp. 885; Everett v. Usona Stamping Works, 123 N. Y. Supp. 106.

**3670** n. 69. Bushby v. Berkeley, 134 N. Y. Supp. 563.

## CHAPTER V

### PARTIES TO APPEAL

**3673** § 2594. The word "surviving" in section 1299 of the Code is not limited to a surviving coplaintiff or co-defendant. A sole plaintiff may move to substitute the personal representatives of a deceased defendant. Reed v. Farrand, 198 N. Y. 207, 91 N. E. 541.

**3674** n. 13. Where motion for substitution is defeated the appeal will be dismissed. Van Nostrand v. Van Nostrand, 121 App. Div. 262, 105 N. Y. Supp. 798.



## CHAPTER VI

## TIME TO APPEAL

**3682** n. 5. But a judgment entered without notice of taxation of costs, where a notice of retaxation is thereafter given, does not extend the time in which to appeal. *Ost v. Salmanowitz*, 54 Misc. 147, 104 N. Y. Supp. 489; *Gersman v. Levy*, 58 Misc. 174, 108 N. Y. Supp. 1107. Contra, *Dobyns v. Commercial Trust Co.*, 50 Misc. 629, 98 N. Y. Supp. 748.

**3685** n. 18. *Hamilton v. Mendham*, 133 N. Y. Supp. 977.

**3685** n. 21. *Hall v. Brown*, 139 App. Div. 388, 124 N. Y. Supp. 52.

**3686**. Admission of service of notice of appeal does not extend the time. *Matter of Seymour*, 3 Current Ct. Dec. 109.

**3686** n. 24. Cannot resettle order so as to extend time to appeal. *Shiffner v. Beck*, 159 App. Div. 821, 145 N. Y. Supp. 1145.

**3689** n. 46. *Gilpin v. Savage*, 138 App. Div. 416, 124 N. Y. Supp. 875.

**3689** n. 47. Not invalid because part is printed. *Gersman v. Levy*, 57 Misc. 156, 108 N. Y. Supp. 1107 [affirmed in 58 Misc. 174, 108 N. Y. Supp. 1107].

**3689** n. 52. *Rohr v. Linch*, 78 Misc. 45, 137 N. Y. Supp. 752.

**3690** n. 60. *Dobyns v. Commercial Trust Co.*, 50 Misc. 629, 98 N. Y. Supp. 748.

**3691**. Notice misspelling plaintiff's name by adding an "n" to his surname (*Gersman*) is not a nullity. *Gersman v. Levy*, 57 Misc. 156, 108 N. Y. Supp. 1107 [affirmed in 58 Misc. 174, 108 N. Y. Supp. 1107].

**3691** n. 65. *Van Horn v. New York Pie Baking Co.*, 58 Misc. 376, 109 N. Y. Supp. 676. Objection that the cover when folded concealed the notice of the entry of judgment

held frivolous. *Fourteenth Street Bank v. Strauss*, 54 Misc. 588, 104 N. Y. Supp. 956.

**3691** n. 66. But notice of entry of judgment in the City Court of New York, which states the judgment to have been "entered herein in the office of the clerk of the court within named" is sufficient, since that court has but one clerk. *Lees v. Wormser*, 52 Misc. 455, 103 N. Y. Supp. 562.

**3692** n. 73. *Gilpin v. Savage*, 138 App. Div. 416, 124 N. Y. Supp. 875. The copy must be a true copy. *Schoenberg v. City Trust & S. D. Co.*, 52 Misc. 104, 101 N. Y. Supp. 798.

**3692** n. 74. Since the amendment of 1897 the judgment does not require the "attestation" of the clerk. *Gersman v. Levy*, 58 Misc. 174, 108 N. Y. Supp. 1107.

**3693** n. 77. But see *Van Horn v. New York Pie Baking Co.*, 58 Misc. 376, 109 N. Y. Supp. 676.

**3693** n. 78. But signature of clerk's Christian name in copy as "Thos." where it was "Thomas" in the original is insufficient to invalidate the notice of entry. *Salzman v. Mendee*, 49 Misc. 625, 97 N. Y. Supp. 298.

**3693** n. 80. *Gersman v. Levy*, 57 Misc. 156, 108 N. Y. Supp. 1107 [affirmed in 58 Misc. 174, 108 N. Y. Supp. 1107, which discusses this question].

**3694** n. 81. *Van Horn v. New York Pie Baking Co.*, 58 Misc. 376, 109 N. Y. Supp. 676.

**3694** § 2609. See also *infra*, **3695** n. 87.

**3695** n. 87. This Code provision is extended by Laws 1909, c. 418, to appeals from judgments.

**3696** n. 94. In re Water Supply in City of New York, 119 App. Div. 74, 103 N. Y. Supp. 911.

**3696** n. 95. After thirty days, order cannot be appealed from, although motion to reopen and resettle it has been denied and the time to appeal from the latter order has not expired. *Beach v. Beach*, 160 App. Div. 229, 145 N. Y. Supp. 409.

## CHAPTER VII

## TAKING THE APPEAL

**3700.** While an allowance of an appeal to the Court of Appeals, regularly granted by a judge thereof, is not reviewable by the Court of Appeals (*Hannon v. Siegel-Cooper Co.*, 164 N. Y. 566), the order allowing the appeal may be set aside by the Court of Appeals where the appeal was not regularly allowed. *Carlisle v. Barnes*, 183 N. Y. 272.

**3700 § 2614.** Where a judge of the Court of Appeals has denied a motion for leave to appeal, the motion cannot be renewed before another judge of the Court of Appeals, at least not unless leave to renew is granted by the first judge. *Carlisle v. Barnes*, 183 N. Y. 272.

**3700 § 2615.** Leave to appeal will be denied where the time to appeal has expired. *Dickey v. Gortner*, 158 App. Div. 942, 143 N. Y. Supp. 113.

**3701 n. 4.** Allowance thereafter authorizes dismissal by the Court of Appeals. *Terwilliger v. Browning, K. & Co.*, 207 N. Y. 479, 101 N. E. 463.

**3701 n. 6.** In re Water Supply in City of New York, 119 App. Div. 74, 103 N. Y. Supp. 911.

**3703 § 2618.** Where Appellate Division has certified a question which has not yet been decided by the Court of Appeals, it will permit, of its own motion, the same in subsequent cases involving the same question. *Matter of Simmons*, 154 App. Div. 897, 138 N. Y. Supp. 1142.

**3705 n. 25.** Where only other question was one of fact. *Hopper v. Willcox*, 155 App. Div. 224, 140 N. Y. Supp. 423.

**3705 § 2619.** Appellate Division determines the right and form of certification of appeals. *Callanan v. Keeseville*, etc., R. R. Co., 199 N. Y. 268, 92 N. E. 747 [rev. 131 App. Div. 306].

**3706 n. 33.** *Frank L. Fisher Co. v. Woods*, 187 N. Y. 90.

**3710 n. 49.** *Contra, Gersman v. Levy*, 58 Misc. 174, 108 N. Y. Supp. 1107.

**3710 n. 52.** *Contra, Slepın v. Beck*, 84 Misc. 254, 145 N. Y. Supp. 530 (where the court said: "The second attorney is not substituted for the first, but is retained for a new and different employment. Chancellor Walworth in *McLaren v. Charriér*, 5 Paige, 530, 534, had no doubt as to the right of an appellant to retain a new solicitor to prosecute an appeal in chancery, and the practical reason for permitting a new retainer without first requiring an order of substitution are shown in *Magnolia Metal Co. v. Sterlingworth R. S. Co.*, 37 App. Div. 366, 367. The contrary conclusion reached by the General Term of the Third Department in *Shuler v. Maxwell*, 38 Hun, 240, was not necessary to the decision in that case, since it appears by the report that the appellant was in no way affected by the judgment from which she appealed. The opinion expressed in that case, as well as the decision in *Pensa v. Pensa*, 3 Misc. Rep. 417, must, I think, be regarded as in conflict with the decision of the General Term in this department in *Cruikshank v. Goodwin* (*supra*) and as erroneous").

**3710 § 2630.** Misdescription of order appealed from will be disregarded where intent is clear. *Monaco v. Lange*, 146 App. Div. 18, 130 N. Y. Supp. 581. Misdescription of final order appealed from is amendable in the court of review. *Seymour v. Hughes*, 55 Misc. 248, 105 N. Y. Supp. 249. Where one joint defendant appeals, a recital in the notice of appeal that the judgment is against one instead of both defendants does not preclude appellant from obtaining a modification of the judgment for the benefit of both defendants. *Electrical Accessories Co. v. Mittenthal*, 146 App. Div. 647, 131 N. Y. Supp. 433.

**3710 n. 54.** Describing appeal as "from a paper" gives

no jurisdiction. *Kramer v. Barth*, 79 Misc. 80, 139 N. Y. Supp. 341.

**3712.** On appeal from an order striking out portions of the complaint as irrelevant or redundant, an order extending time to plead and move, not specified in the notice of appeal, cannot be reviewed. *Landmesser v. Hayward*, 157 App. Div. 74, 141 N. Y. Supp. 730. If notice of appeal does not mention the order denying a new trial, the Appellate Division cannot review any question presented exclusively by the motion for a new trial. *Welti v. Cohen*, 157 App. Div. 65, 141 N. Y. Supp. 670.

**3713 n. 72.** There is no such provision where the appeal is from a new trial ordered by the Appellate Term in an action tried in the Municipal Court of the city of New York. *Hart v. North German Lloyd Steamship Co.*, 108 App. Div. 279, 95 N. Y. Supp. 733.

**3714 § 2631.** See ante, **3626 § 2545.** Notice of appeal must specify order confirming award of arbitrators, in order to have it reviewed on appeal from the judgment entered on such order. *Matter of Gitt*, 138 App. Div. 147, 123 N. Y. Supp. 304. On an appeal from a judgment entered on overruling a demurrer, the order overruling the demurrer is not an intermediate order and may be reviewed on the appeal from the judgment though the notice of appeal does not specify any intention to review the order. *Smith v. Thompson*, 118 App. Div. 6, 103 N. Y. Supp. 336.

**3714 n. 74.** Rule applies only to appeals from a judgment that is appealable. *Jones v. Sabin*, 122 App. Div. 666, 107 N. Y. Supp. 508.

**3714 n. 77.** *Waldo v. Schmidt*, 198 N. Y. 193, 91 N. E. 521; *Howett v. Howett*, 158 App. Div. 28, 142 N. Y. Supp. 908. In such a case, a decision sustaining a demurrer to the complaint cannot be reviewed on an appeal from the judgment of dismissal entered on a refusal to plead over. *C. A. Duerr & Co. v. Craven*, 114 N. Y. Supp. 784.

**3715.** Where the judgment is not appealable, the orders mentioned in the notice of appeal are not reviewable. *Jones v. Sabin*, 122 App. Div. 666, 107 N. Y. Supp. 508.

**3717** n. 96. *Kalvin v. Meyers*, 117 N. Y. Supp. 141.

**3718** n. 109. *Adams v. Bristol*, 126 App. Div. 660, 111 N. Y. Supp. 231. But if a party who did not appeal in the first instance, appeals from the final judgment, the rule seems to be otherwise. *Bauer v. Hawes*, 115 App. Div. 492.

**3719** § 2633. One joint defendant who appeals need not serve notice on the other where not to the prejudice of the latter. *Electrical Accessories Co. v. Mittenthal*, 146 App. Div. 647, 131 N. Y. Supp. 433.

**3719** n. 118. Where coparties do not serve written notice of the entry of judgment upon the appellant, but the opposing party does, notice of appeal need not be served upon such coparties. *Smith v. Havens Relief Soc.*, 115 App. Div. 185, 103 N. Y. Supp. 770.

**3721** n. 130. *Smith v. Havens Relief Soc.*, 115 App. Div. 185, 103 N. Y. Supp. 770. See *Vose v. Conkling*, 159 App. Div. 201, 144 N. Y. Supp. 1.

**3723** n. 144. Section 1300 of the Code is amended by Laws 1909, c. 416, by adding the following sentence: "Upon an appeal to the Court of Appeals from an order of the Appellate Division, made upon an appeal from the surrogate's court, the notice of appeal shall be filed with the clerk of the surrogate's court." If appeal is from judgment directing registration of title to real property, notice should be filed with the register. *Lachmann v. Brookfield*, 135 N. Y. Supp. 261.

**3723** n. 146. See *Lally v. New York Cent. & H. R. R. Co.*, 132 App. Div. 66, 116 N. Y. Supp. 470.

**3724** n. 150. But see *Armstrong v. Heide*, 49 Misc. 430, 99 N. Y. Supp. 817.

**3724** § 2638. The court from which the appeal is taken

may allow an amendment. *Vose v. Conkling*, 159 App. Div. 201, 144 N. Y. Supp. 1. Special Term cannot allow amendment of notice of appeal, where appeal is from Appellate Division to the Court of Appeals. *Bulkley v. Whiting Mfg. Co.*, 136 App. Div. 479, 121 N. Y. Supp. 159. Where an appeal is taken from the Appellate Division to the Court of Appeals, the notice of appeal cannot be amended by the Special Term, since it is not the court "in" which the appeal is taken, although there is only one Supreme Court. *Waldo v. Schmidt*, 200 N. Y. 199, 93 N. E. 477. Where an appeal is taken to the Court of Appeals from the Appellate Division, either court has power to amend the notice of appeal. *Waldo v. Schmidt*, 200 N. Y. 199, 93 N. E. 477 [disapproving *Bulkley v. Whiting Mfg. Co.*, 136 App. Div. 479, 121 N. Y. Supp. 159, so far as to the contrary]. Special Term cannot amend notice of appeal to Court of Appeals, so as to include the order and judgment of the Appellate Division, where it specifies an interlocutory judgment only. *Waldo v. Schmidt*, 139 App. Div. 589, 124 N. Y. Supp. 189. Notice of appeal cannot be amended so as to extend time to appeal. *Bulkley v. Whiting Mfg. Co.*, 136 App. Div. 479, 121 N. Y. Supp. 159. Appellate Division cannot allow amendment of notice to appeal to Court of Appeals, where effect will be to extend the time to appeal. *Waldo v. Schmidt*, 139 App. Div. 589, 124 N. Y. Supp. 189. An amendment of the notice will not be denied on the ground that it extends the time to appeal beyond the period limited by statute where it merely enables appellant to make his notice more explicit by adding to his correct description of the interlocutory judgment appealed from a reference to the fact that it was affirmed by the Appellate Division. *Waldo v. Schmidt*, 200 N. Y. 199, 93 N. E. 477. Amendment of name of court to which appeal is taken may be allowed after time to appeal has expired. *Vose v. Conkling*, 159 App. Div. 201, 144 N. Y. Supp. 1.

**3727** n. 171. *People v. Judson*, 59 Misc. 538, 112 N. Y. Supp. 408.

**3731** § 2643. Sufficiency of sureties, see *Northern Bank v. Mulligan*, 156 App. Div. 927, 142 N. Y. Supp. 1132.

**3733** § 2649. Right of attorney to sue on appeal bond to recover his fees, on appeal from order allowing alimony and counsel fees, where the parties have become reconciled before the hearing of the appeal, see *Gordon v. United States F. & G. Co.*, 76 Misc. 203, 134 N. Y. Supp. 891.

**3735** § 2651. May permit notice to be served nunc pro tunc where notice of appeal returned because not on required quality of paper. *People ex rel. Collins v. Ahearn*, 136 App. Div. 452, 120 N. Y. Supp. 980.

## CHAPTER VIII

### SECURITY TO STAY PROCEEDINGS

**3739** n. 1. Perfected appeal does not of itself stay the execution of the judgment or order appealed from. *Matter of Meyer*, 209 N. Y. 59, 102 N. E. 606 [citing *Nichols' N. Y. Pr.* 3739, 3740].

**3739** § 2652. On appeal from City Court of New York, undertaking need not be approved by a justice of the court before filing. *Rabinowitz v. Lipschitz*, 65 Misc. 311, 121 N. Y. Supp. 669.

**3740.** The Appellate Division, where its order reversing a judgment and granting a new trial has been appealed from and the appeal is still pending, granted a motion to stay proceedings pending the appeal, where the case had been restored to the calendar. *Renauld Freres Selling Branch v. Sewall & Alden*, 153 App. Div. 888, 138 N. Y. Supp. 313. After affirmance by the Appellate Division, the lower court may, in a case where appellant has given an injunction bond, stay all proceedings pending the appeal to the Court of Ap-



peals. *Zobrest v. East Buffalo Brewing Co.*, 77 Misc. 218, 135 N. Y. Supp. 815.

**3740** n. 9. *Erie R. Co. v. Rochester-Corning-Elmira Traction Co.*, 57 Misc. 180, 107 N. Y. Supp. 940.

**3740** n. 12. A decree directing the execution of a mortgage is not stayed by filing with the county clerk such a mortgage to await the result of the appeal, where no security is given as herein required. *Walz v. Humrich*, 158 App. Div. 584, 143 N. Y. Supp. 806.

**3741** n. 17. But City Court of New York may grant a stay pending an appeal from an order overruling a demurrer but it cannot grant defendant (appellant) time to plead after a determination of the appellate court, but such relief must be sought in the higher court. *Vogel v. Vogel*, 131 N. Y. Supp. 577.

**3742** n. 18. Prohibition. *People v. Dayton*, 120 App. Div. 814, 105 N. Y. Supp. 809.

**3743** n. 21. Power of Special Term to grant stay, see *Hart v. A. L. Clark & Co.*, 60 Misc. 366, 113 N. Y. Supp. 451.

**3746** § 2659. Sections 1327 and 1328 of the Code apply to an "original" judgment or order and not to an order or judgment on appeal for the restitution of property, the delivery of which by one party to another pending the action has been erroneously required. *Lamport v. Smedley*, 157 App. Div. 422, 142 N. Y. Supp. 350.

**3748** n. 45. Filing an undertaking under this Code provision does not suspend, on appeal to the Court of Appeals, the operation of a writ of mandamus ordered by the Appellate Division. *People ex rel. Keeseville, etc., R. R. Co. v. Powers*, 73 Misc. 269, 130 N. Y. Supp. 865.

**3748** n. 47. Does not apply where property replevied has been sold and judgment for defendant is a money judgment. *Gilroy v. Everson Hickok Co.*, 120 App. Div. 207, 105 N. Y. Supp. 188.

**3749** n. 51. This provision applies only where an appeal

has. been perfected. *Walz v. Humrich*, 158 App. Div. 584, 143 N. Y. Supp. 806.

**3750** n. 54. Section 1331 of the Code is not applicable where one has no right to possession. "Suffer waste" applies to a person in possession and capable of suffering waste by neglect or omission. *Midwood Park Co. v. Baker*, 142 App. Div. 495, 127 N. Y. Supp. 48.

**3755** § 2666. Where the Appellate Division denies an application for leave to appeal to the Court of Appeals, the continuance of a stay of proceedings is improper. *O'Gorman v. Pfeiffer*, 146 App. Div. 928, 131 N. Y. Supp. 125.

**3755** § 2667. Pending application to appeal from the Appellate Term to the Appellate Division, only the justices of the Appellate Term can grant a stay of proceedings. *Webster v. Abbott*, 69 Misc. 309, 125 N. Y. Supp. 635.

**3755** n. 69. This rule applies to a counterclaim asking for specific performance upon which judgment is rendered. *Bloomgarden v. Hoffman*, 116 App. Div. 719, 102 N. Y. Supp. 20.

**3755** n. 70. Giving the usual undertaking to perfect an appeal to the Court of Appeals does not operate as a stay. *Sagehomme v. Pugh & Co.*, 53 Misc. 41, 421, 102 N. Y. Supp. 923.

**3757** n. 86. See *McGovern v. Manhattan R. Co.*, 112 App. Div. 184, 98 N. Y. Supp. 97, where it was held improper to grant a stay to enable the losing party in the Appellate Division to appeal to the Court of Appeals, where no appeal could be taken as of right. Illustration of when proper to refuse stay, see *Bouden v. Sire*, 119 App. Div. 194, 104 N. Y. Supp. 460.

**3758** n. 93. Compare *McMahon v. Myers*, 112 N. Y. Supp. 1028.

**3764** n. 132. Section 1307 of the Code, providing that an undertaking on appeal must be filed with the clerk with whom the judgment or order appealed from is entered, was

amended in 1910 by adding "except that upon an appeal to the Court of Appeals the undertaking must be filed with the clerk of the court wherein the original judgment or order was entered."

**3766 n. 137.** Code provision does not apply to an undertaking to stay a sale on foreclosure pending an appeal from an order denying a motion to compel the bringing in of persons named as defendants in the foreclosure suit, so as to invalidate the undertaking where sureties do not justify. *Knickerbocker Trust Co. v. Lounsbury*, 122 App. Div. 357, 106 N. Y. Supp. 587.

**3767 n. 142.** In such a case, however, the court will not, on motion, cancel the undertaking on behalf of the appellant and his sureties. *Riddle v. MacFadden*, 60 Misc. 569, 112 N. Y. Supp. 498.

**3771 § 2679.** There is no liability on a bond given on appeal from a default judgment, although the appeal was dismissed, where the judgment was afterwards vacated. *Regierer v. United States Fid. & G. Co.*, 136 N. Y. Supp. 42.

**3772.** If undertaking is to pay the "judgment," no liability arises where the court reverses an order denying a motion to set aside the verdict and for a new trial. *Gelden v. National Surety Co.*, 78 Misc. 38, 137 N. Y. Supp. 716.

**3772 § 2680.** Reversal of judgment as to one joint tortfeasor creates liability although the other did not appeal. *Schultz v. U. S. Fidelity, etc., Co.*, 201 N. Y. 230, 94 N. E. 60 [aff. 134 App. Div. 260, 118 N. Y. Supp. 977].

**3778 n. 196.** Action may be stayed by temporary injunction. *Roth v. Rosenthal*, 160 App. Div. 39, 144 N. Y. Supp. 963.

**3779 § 2690.** Collateral attack on judgment, see *Brownell v. Snyder*, 122 App. Div. 246, 106 N. Y. Supp. 771.

## CHAPTER IX

## EFFECT OF APPEAL

**3785 § 2700.** Appellate court may stay proceedings in an action pending an appeal taken from an "order" entered therein. *Fleishman v. Mengis*, 118 N. Y. Supp. 671. Where an injunction restraining the defendants from rendering services to persons other than the plaintiff has been granted by final decree, an order made by another judge staying the enforcement of the injunction pending the decision of an appeal to the Appellate Division, without requiring security or imposing adequate terms, is an abuse of discretion. *Ziegfeld v. Norworth*, 140 App. Div. 414, 125 N. Y. Supp. 504.

**3785 n. 4.** Cannot dismiss appeal for failure to serve notice of appeal. *Gersman v. Levy*, 58 Misc. 174, 108 N. Y. Supp. 1107.

**3786 § 2701.** See also ante, **3724 § 2638.** Where defendant has appealed from an order striking out part of an answer and granting judgment on the pleadings with leave to plead over within twenty days, the Special Term cannot extend the time to plead over, pending the appeal, but may in such a case stay proceedings pending the appeal. *Schwabe v. Herzog*, 157 App. Div. 672, 142 N. Y. Supp. 652. To same effect, *Nilsson v. Lawrence*, 148 App. Div. 155, 132 N. Y. Supp. 664; *Vogel v. Vogel*, 131 N. Y. Supp. 577. "The appeal from the judgment constituted no barrier to the subsequent motion to strike the costs from the judgment." *Cornwell v. Sheldon*, 134 App. Div. 58, 118 N. Y. Supp. 707, 709. The rule is laid down in *Tedford v. Lichtenstein*, 129 App. Div. 35, 113 N. Y. Supp. 358, that "the question as to whether or not the record filed in" the Appellate Division "is the proper record is one which must be determined by that court," and not by the Special Term. That case is fol-

lowed by holding the Special Term will not strike a case on appeal, served by defendant and retained by plaintiff, in *Waldo v. Schmidt*, 62 Misc. 71, 115 N. Y. Supp. 1023. After the printed papers have been served and filed in the appellate court, the lower court cannot enforce its order for the recall of the record. *Koeppel v. Koeppel*, 48 Misc. 358, 95 N. Y. Supp. 812.

**3788.** See also post, **3804** § 3723. Surrogate has no authority to open a default in serving printed papers on appeal. *Matter of Fletcher*, 158 App. Div. 916, 143 N. Y. Supp. 859, 860.

**3788 n. 24.** But it cannot strike a finding after affirmance by the Appellate Division and before an appeal to the Court of Appeals. *Ward v. Ward*, 133 App. Div. 73, 117 N. Y. Supp. 697.

**3790** § 2704. Appeal from interlocutory judgment does not waive right to move for an amendment thereof by striking out an improper provision for costs. *Marshall v. Hatfield*, 138 N. Y. Supp. 733.

## CHAPTER X

### PAPERS ON APPEAL

**3795** § 2711. There is no default in failing to file a return, until justification of the sureties. *Polito v. Pitriello*, 196 N. Y. 517, 89 N. E. 425.

**3796 n. 19.** See also ante, **2788** § 225.

**3796 n. 21.** This rule was amended in 1906 as to covers and size of type.

**3796 n. 22.** By amendment in 1906, the exception as to time extends to appeals from interlocutory judgments.

**3798** § 2715. On an appeal from an order refusing a re-settlement of a case on appeal, it is necessary to insert in the papers on appeal material extracts from the stenog-

rapher's minutes read on the motion, but such minutes will not be required to be printed in full. *Raymond v. Tiffany*, 135 App. Div. 353, 120 N. Y. Supp. 380.

**3799** § 2717. All of the judgment roll must be printed unless the parties consent to the contrary. *Muller v. Philadelphia*, 144 App. Div. 592, 129 N. Y. Supp. 1037. When a justice of the Supreme Court resigns he has no further power to act as such even in cases which have been tried before him. Thus an order made by him after his resignation granting an application to resettle the record on appeal of a case which had been tried before him is a nullity. *Hein v. Hein*, 148 App. Div. 249, 132 N. Y. Supp. 112. Where a copy of the answer is not furnished by the appellant, it will be presumed, to sustain the judgment, that it contains the allegations which respondent claims it contained. *Perkins v. Storrs*, 114 App. Div. 322, 99 N. Y. Supp. 849.

**3799** n. 36. Special verdict is part of record and appellate court may direct such judgment thereon as either party may be entitled to. *Gause v. Commonwealth Trust Co.*, 124 App. Div. 438, 108 N. Y. Supp. 1080.

**3800** n. 41. *Parke, Davis & Co. v. Rouden*, 117 N. Y. Supp. 945. See also post, **3853** n. 4.

**3801.** An amendment to Rule 43 of the General Rules of Practice which will save much valuable time of the appellate court is the following: "At the top of each page of the case or bill of exceptions must be printed the name of the witness then testifying and of the party calling him, and indicating whether the examination is direct, cross or redirect. Each affidavit or other paper printed upon an appeal from an order shall be preceded by a description thereof that must specify on whose behalf it was read; and the name of the affiant shall be printed at the top of each page containing an affidavit. On an appeal from an order granting or denying a motion to strike out parts of a pleading as irrelevant, redundant or scandalous, or to make a pleading more def-

inite and certain, the portion of the pleading to which the motion relates must be printed in italics." See also, as to indexing, post, **3803** n. 57. "We wish again to call attention to the fact that the appellant, in preparing this record, failed to comply with Rule 43 of the General Rules of Practice, as amended in 1910, which requires that the portion of a complaint to which a motion is directed must be printed in italics, or some other method adopted to indicate it." *Park & Tilford v. Realty Adv. & Supply Co.*, 160 App. Div. 21, 144 N. Y. Supp. 907.

**3801** n. 45. Where judgment rolls recited in an order are not necessary to be printed on appeal from the order, appellant may apply to the court from which the appeal is taken to determine the parts thereof to be printed on appeal. *Conlon v. Kelly*, 126 App. Div. 624, 110 N. Y. Supp. 1070. Rule 41 of the General Rules of Practice was amended in 1910 by adding the following sentence: "If the judge from whose order the appeal is taken orders that it shall not be necessary to insert in the printed papers upon which the appeal is to be taken such exhibits or other voluminous documents as are not necessary for a consideration of the questions raised by the appeal, the clerk shall then certify that the printed papers are true copies of the originals and of the whole thereof specified in the order except those omitted by order of the court."

**3802** n. 50. This provision was omitted by the 1910 amendment of the rule.

**3802** n. 51. Rule 3 of the General Rules of Practice was amended in 1910 by adding the following sentence: "When an opinion has been delivered by the court, it shall be filed with the order and shall be considered a part of the record upon which the order was made; and if the order does not state the grounds upon which it was made, the opinion may be considered to ascertain such grounds."

**3802** n. 52. *Rathbone v. Ayer*, 117 N. Y. Supp. 1041.

So on an appeal to the Appellate Term. *Israel v. Ury*, 52 Misc. 523, 525, 102 N. Y. Supp. 871, 873.

**3802** n. 53. See also *Coffey v. New York City R. Co.*, 117 App. Div. 670, 102 N. Y. Supp. 1232. Under Rule 3 of the General Rules of Practice, as amended in 1910, the Appellate Division may look to the opinion of the lower court to ascertain the ground on which the order appealed from was made. *Matter of Trombley*, 150 App. Div. 14, 134 N. Y. Supp. 374.

**3803** n. 57. By amendment in 1910 the old provision as to indexing was omitted and the following substituted: "The printed papers on appeal shall contain an index in the front thereof. The index of the exhibits shall concisely indicate the contents or nature of each exhibit and the folio of the case at which it is admitted in evidence and at which it is printed in the record. Said index shall also contain a reference to the folios at which a motion for a dismissal of the complaint or the direction of a verdict is contained; and to the certificate that the case contains all the evidence."

**3803** n. 64. Rule 41 was amended in 1910 so as to require the filing and service of the printed papers on appeal, where it is necessary to make a case, within twenty days after the settlement of the case, instead of after the settlement "and filing."

**3804** n. 66. When extension properly refused, see *McMahon v. Myers*, 112 N. Y. Supp. 1028.

**3804** § 2723. A motion to open a default in filing and serving the printed papers on which an appeal is based, after the case is settled and filed, must be made in the appellate court. *Hansen v. Walsh*, 117 App. Div. 39, 101 N. Y. Supp. 1061; *Bankers' Money Order Ass'n v. Nachod*, 125 App. Div. 373, 109 N. Y. Supp. 847.

**3804** n. 68. See *McCarthy v. Metropolitan St. R. Co.*, 48 Misc. 633, 96 N. Y. Supp. 139 (practice on appeal to Appellate Term).



**3805** § 2725. Unless respondent consents, appeal must be heard on the entire judgment roll, although there are separate appeals by several defendants. *Muller v. Philadelphia*, 144 App. Div. 592, 129 N. Y. Supp. 1037.

**3805** § 2727. A motion to amend a record on appeal should be made at the Appellate Division and not at the Special Term or before the justice who tried the case. *Hein v. Hein*, 148 App. Div. 249, 132 N. Y. Supp. 112.

**3806** § 2728. Mistakes in minutes of lower court may be corrected by granting a motion to resettle by modifying on appeal order denying a motion to resettle. *Solomon v. Independent Order, S. J.*, 80 Misc. 396, 141 N. Y. Supp. 313. Exhibits cannot be omitted from printed record even by stipulation. *Collender v. Reardon*, 121 N. Y. Supp. 531.

## CHAPTER XI

### BRIEFS OR POINTS

**3810** n. 3. By amendment in 1906 this exception includes appeals from interlocutory judgments.

**3811** § 2736. Where material points are first inserted in a reply brief, the remedy is by motion to strike such brief from the files. *Ardolino v. Reinhardt*, 128 App. Div. 339, 112 N. Y. Supp. 641.

**3813** § 2740. Briefs should not present views or use inappropriate language on impertinent matters. *Barth v. Borden's Condensed Milk Co.*, 104 N. Y. Supp. 882. In the Appellate Term the rule requiring, where quotations are made from the testimony, reference to the pages of the minutes where the quoted matter can be found, will be strictly enforced. *Blumenthal v. Stancliff*, 104 N. Y. Supp. 362.

**3814** n. 13. But see *Galloway v. Erie R. Co.*, 116 App. Div. 777, 102 N. Y. Supp. 25.

## CHAPTER XII

## CALENDARS AND PROCEEDINGS PRELIMINARY TO HEARING

**3817 n. 6.** This rule was amended in 1906 so as to include all appeals from interlocutory judgments, and to provide that notices of argument of appeals within this rule must contain the claim that the appeal is one entitled to be heard under this rule. Provision is also made as to hearing of motions.

**3820 n. 21.** By amendment of this rule in 1906 any cause which is regularly called and passed, without postponement by the court for good cause shown at the time of the call, shall be stricken from the calendar.

**3820 n. 25.** By amendment of this rule in 1906 the words in the last sentence after the word "them" are omitted.

**3822 § 2748.** In the first department, where the record in a mandamus suit presents merely questions of law, and there is no case and exceptions on appeal, the appeal should be placed on the non-enumerated calendar. *People ex rel. Connolly v. Board of Education*, 113 App. Div. 315, 99 N. Y. Supp. 1.

**3823.** Separate appeals from a judgment and from an order denying a new trial may be brought on separately, or may be consolidated and heard at one time upon the same record. *Hein v. Hein*, 148 App. Div. 249, 132 N. Y. Supp. 112. Where the record on one appeal has been filed, if either party wishes both appeals heard together on the same record, the proper practice is to move at the Appellate Division to consolidate the appeals. *Hein v. Hein*, 148 App. Div. 249, 132 N. Y. Supp. 112. Code provision amended by Laws 1909, c. 65, so as to read as follows:

**"§ 229. Hearing of appeals when title to public office is involved.** An appeal from a judgment or decree in any case in which the question of the title to a public office is

directly or collaterally at issue or in any manner involved, may be placed on the calendar and noticed for hearing on any day in the Appellate Division of the Supreme Court, in the first department, or in the Court of Appeals, and shall be heard on said day."

**3825** § 2752. Consolidation of appeals, see *Muller v. Philadelphia*, 144 App. Div. 592, 129 N. Y. Supp. 1037.

## CHAPTER XIII

### HEARING

**3828** n. 4. This provision was amended in 1914 (c. 349) so as to read as follows: "1. An appeal taken as prescribed in this title must be heard by the Appellate Division of the Supreme Court, except that appeals from judgments or orders of the Municipal Court of the city of New York or from judgments or orders of the City Court of the city of New York may be heard either by the Appellate Division of the Supreme Court, or by not less than three justices of the Supreme Court in each of the first and second judicial departments, who shall be designated for that purpose by the justices of the Appellate Division sitting in said departments and who shall be known as the Appellate Term of the Supreme Court in the first and second departments, respectively." And the following new subdivision was added: "2. When an appeal shall have been heard and determined by an Appellate Term constituted as herein provided, the justices thereof or a justice of the Appellate Division in the same department may allow a further appeal to be taken from that determination to said Appellate Division." Subdivision four was amended by adding at the end thereof: "and except as otherwise provided in a statute enacted by the legislature in the year nineteen hundred and fourteen, entitled 'An act in relation to the Municipal Court of the

city of New York, and repealing certain statutes affecting such court, its justices and officers.””

**3828** n. 5. Rule amended in 1910 so as to make such motions hearable “upon such days as are designated by the special rule of the Appellate Division in each Department.”

**3829.** An agreement between the attorneys whereby defendants are not to appear in opposition to plaintiff’s appeal, and, after a year, in a certain event, they are to prosecute their appeal, which will require the making of a case and exceptions, while plaintiff’s appeal is taken and presented on the judgment roll, without any case and exceptions, is not allowable. The court will not permit the attorneys to agree that the plaintiff’s appeal may be first heard, and, in a certain event, the defendant’s appeal may afterwards be brought before the court for hearing. *Hawks v. Warren*, 133 App. Div. 863, 117 N. Y. Supp. 1097.

**3829** n. 10. This rule was amended in 1906 as to the last sentence by providing that on appeals from orders and interlocutory judgments not more than thirty minutes shall be occupied by appellant’s counsel, nor more than twenty-five minutes by respondent’s counsel, unless express permission is given and the case placed at the foot of the order calendar.

## CHAPTER XIV

### REHEARING

**3832** n. 4. *Bumpus v. Anderson*, 49 Misc. 417, 99 N. Y. Supp. 826.

**3832** n. 5. It cannot be assumed that any particular point has been overlooked because not discussed in the opinion. *Burke v. Continental Ins. Co.*, 184 N. Y. 570.

**3832** n. 8. *Portland Co. v. Hall & Grant Const. Co.*, 123 App. Div. 495, 108 N. Y. Supp. 821.

**3833.** The affirmance by the Appellate Division, without an opinion, of an order of the trial court, made in the exercise of its discretion, setting aside the verdict of a jury, is not to be taken as an approval in any degree of the expression by the trial court of its views in colloquy with counsel. All that is determined is that the Appellate Division has declined to reverse an order, made in the discretion of the trial term, directing a new trial, upon which new trial all the issues are to be presented de novo to another jury. *Griffin v. Brady*, 133 App. Div. 939, 118 N. Y. Supp. 240.

**3833 n. 20.** As where mistake was in favor of party objecting. *Strong v. Gambier*, 155 App. Div. 294, 140 N. Y. Supp. 410.

**3836 n. 33.** See amendment of rule in 1906 which seems to require the notice to contain what is stated under note 36 of the original work.

**3837 § 2766.** Errors as to admission of testimony will be disregarded where original opinion shows that the court gave no weight to the incompetent testimony. *Strong v. Gambier*, 155 App. Div. 294, 140 N. Y. Supp. 410.

## CHAPTER XV

### DISMISSAL OR WITHDRAWAL OF APPEAL

**3840 § 2769.** Motion should be denied where the case on appeal has not been settled, and respondent is stayed by failure to pay costs of appeals from orders which he has neglected to offset against costs awarded to him in the judgment appealed from. *Silberman v. Scher*, 156 App. Div. 884, 140 N. Y. Supp. 1145.

**3840 n. 14.** Court of Appeals will not dismiss in part or determine the merits of the appeal. *Waldo v. Schmidt*, 198 N. Y. 193, 91 N. E. 521.

**3841 § 2770.** See also post, **3929 n. 223**; **3855 § 2781**.

Where appellant has left state with intent to avoid compliance with orders of courts, his appeal may be dismissed. *Matter of Meyer*, 209 N. Y. 59, 102 N. E. 606. But it has been held that the fact that party keeps outside state to avoid service in supplementary proceedings is not ground for dismissal of his appeal. *Matter of Ehrich v. Root*, 134 App. Div. 432, 119 N. Y. Supp. 395. An appeal from a judgment in an action to enforce a foreign judgment for alimony should not be dismissed, nor proceedings stayed, because appellant has not obeyed the judgment appealed from but is in contempt for not obeying and has removed to another state. *Moore v. Moore*, 141 App. Div. 532, 126 N. Y. Supp. 412. An appeal to the Court of Appeals from an order of the Appellate Division reversing an order in a proceeding to obtain the custody of a child should be dismissed where the appellant does not intend to obey the order on appeal if unfavorable and in pursuance thereof has intentionally put himself and the child beyond the reach of local process. *Matter of Meyer*, 209 N. Y. 59, 102 N. E. 606. Where appeal is to Court of Appeals, from judgment of reversal by Appellate Division, it will be dismissed where the order does not show whether the reversal is on the law or on the facts. *Stewart v. Home Life Ins. Co.*, 208 N. Y. 519, 101 N. E. 1122. Where reversal of Appellate Division was necessarily on the facts, the appeal held properly dismissed in lieu of affirming the judgment on stipulation. *Carroll v. Bullock*, 207 N. Y. 567, 101 N. E. 438. An appeal from an order denying a motion for a temporary injunction will be dismissed where the motion was made on the original complaint but thereafter a new complaint was filed after demurrer sustained to the original complaint. *Blakeslee v. International Motor Co.*, 161 App. Div. 624, 147 N. Y. Supp. 49. Discharge of receiver pending his appeal from a denial of his application for a contempt order is ground. *Clinton v. Otselie Valley R. Co.*, 155 App. Div. 945, 140 N. Y. Supp.

1113. Refusal to obey orders of court is ground. *White v. White*, 132 N. Y. Supp. 1043.

3841 n. 22. Answering over requires dismissal of appeal from overruling of demurrer. *Keefers v. Hartley Co.*, 150 App. Div. 252, 134 N. Y. Supp. 896.

3843. Unexcused default in filing printed papers on appeal is ground. *Matter of Fletcher*, 158 App. Div. 916, 143 N. Y. Supp. 859, 860. Failure to prosecute for six months is abandonment of appeal from order confirming report of commissioners of estimate and appraisement, under New York charter. *Matter of New York*, 158 App. Div. 912, 143 N. Y. Supp. 811.

3844. Appellate Term, on appeal from judgment of City Court of New York, will not dismiss an appeal until the case is settled. *Musica v. Di Marco*, 74 Misc. 387, 132 N. Y. Supp. 280.

3845 n. 56. *McCarthy v. Natural Carbonic Gas Co.*, 122 App. Div. 257, 106 N. Y. Supp. 811.

3846 n. 64. See *Kelly v. New York City R. Co.*, 122 App. Div. 467, 106 N. Y. Supp. 894.

3846 § 2772. In second department, affidavits opposing motion to dismiss for failure to prosecute must state questions involved, facts out of which controversy arose, and that appeal is meritorious. *Matter of Hagerty*, 148 App. Div. 738, 133 N. Y. Supp. 345.

3846 n. 66. But appeal may be dismissed for failure to file stipulation for judgment absolute although the omission was not noticed until after the cause had been submitted and an opinion written. *Buffalo v. Stevenson*, 207 N. Y. 258, 100 N. E. 798.

3847 n. 72. *Musica v. Di Marco*, 74 Misc. 387, 132 N. Y. Supp. 280.

3847 n. 73. But see *Shubert Theatrical Co. v. Ziegfeld*, 113 N. Y. Supp. 801.

## CHAPTER XVI

## QUESTIONS REVIEWED ON APPEAL

**3853.** Laws 1909, c. 65, adds the following Code section:

“§ 1323a. **Remarks or comments of judge, duly excepted to, shall be subject of review.** In case of an appeal, every remark or comment of the presiding judge during the trial, duly excepted to, shall be the subject of review, but the case and exceptions on appeal shall be settled by the trial justice as now provided by law.”

**3853** § 2779. The appellate court will not make findings of fact to support the judgment. *Polhemus v. Polhemus*, 114 App. Div. 781, 100 N. Y. Supp. 263; *Levin v. Dietz*, 106 App. Div. 208, 94 N. Y. Supp. 419.

**3853** n. 3. May reverse on the facts without taking further testimony and enter an appropriate final decree. *Matter of Van Alostine*, 142 App. Div. 209, 126 N. Y. Supp. 1078.

**3853** n. 4. On an appeal from an order, where the printed papers contain all the papers recited in the order, but it is claimed that other papers were used on the motion, the proper procedure is to move in the lower court for a resettlement of such order and then move in the appellate court for a return of the case. *Koeppel v. Koeppel*, 48 Misc. 358, 95 N. Y. Supp. 812.

**3853** n. 6. Court may require production of certified copies of papers constituting a part of the judgment roll on appeal. *Whitwell v. Wright*, 136 App. Div. 246, 120 N. Y. Supp. 1065.

**3855** n. 15. *Davidson v. Unger*, 139 N. Y. Supp. 157.

**3855** § 2781. The fact that defendants have obeyed a writ of mandamus in part by performing some of the acts which they were commanded to perform does not authorize a dismissal of the appeal where the effect of the writ will be to restrain their future action for some time. *People ex rel.*



Quinn v. Voorhis, 186 N. Y. 263 [reversing 115 App. Div. 118, 100 N. Y. Supp. 717].

**3855** n. 16. Stern v. Marcuse, 128 App. Div. 169, 112 N. Y. Supp. 653.

**3855** n. 17. But see Commonwealth of Massachusetts v. Klaus, 145 App. Div. 798, 130 N. Y. Supp. 713.

**3856** § 2782. An exception to the refusal of the court to allow a jury trial, at the opening of the case, is sufficient to raise the question on an appeal from the judgment, without appealing from the order transferring the case to the Special Term calendar. Allen v. Gray, 201 N. Y. 504, 94 N. E. 652. Order permitting a renewal of the motion, while not ordinarily reviewed, may be where no new facts would throw any light on the question. Anderson v. Illinois Surety Co., 157 App. Div. 691, 142 N. Y. Supp. 719.

**3857** § 2783. Although the findings of fact and conclusions of law are not signed at the end thereof in the usual form, and are not supplemented by a direction for the entry of judgment in accordance therewith, but each finding and conclusion is marked found by the court, and upon them judgment has been entered without objection from counsel for plaintiffs, and both parties have treated the entry of judgment as regular, it must be so regarded on appeal therefrom. Rudiger v. Coleman, 199 N. Y. 342, 346, 92 N. E. 665. Failure to prove that plaintiff, a foreign corporation, had authority to do business in the state cannot be first urged on appeal. Boynton Furnace Co. v. Trohn, 141 App. Div. 773, 126 N. Y. Supp. 695. Where statute of limitations is pleaded, it may be urged on appeal although there was no motion to dismiss the complaint on that ground nor was the question otherwise raised on the trial. Gaines v. New York, 156 App. Div. 789, 142 N. Y. Supp. 401.

**3857** n. 34. Matter of Rochester, 208 N. Y. 188, 47 L. R. A. (N. S.) 151, 101 N. E. 875; Bucksdorf v. Bender, 80 Misc. 498, 141 N. Y. Supp. 515. Damages cannot be reduced on

appeal where question affecting such reduction not raised on the trial. *Borough Development Co. v. Harmon*, 154 App. Div. 689, 139 N. Y. Supp. 362. Rule applied to failure of plaintiff to prove his appointment as administrator. *Dose v. Hirsch Bros.*, 65 Misc. 515, 120 N. Y. Supp. 91. Failure to prove cause of action as pleaded. *McGovern v. Supreme Council, etc.*, 134 App. Div. 686, 119 N. Y. Supp. 480.

**3858.** But judgment should be reversed where a verdict was directed on a cause of action not referred to in the complaint, although the question was tried without objection. *Ely v. Russell*, 135 App. Div. 303, 119 N. Y. Supp. 916.

**3858 n. 40.** *Manhattan Wrecking & Contracting Co. v. Eidlitz*, 78 Misc. 396, 138 N. Y. Supp. 308; *Deri v. Union Bank*, 65 Misc. 531, 120 N. Y. Supp. 813. Failure of complaint to show filing of notice of intention to sue. *McCarton v. New York*, 149 App. Div. 516, 130 N. Y. Supp. 939. Claim that defense relied on at the trial was not fairly within the pleadings cannot be first urged on appeal. *Shipman v. Treadwell*, 150 App. Div. 57, 133 N. Y. Supp. 970.

**3858 n. 42.** *Coley v. Tallman*, 107 App. Div. 445, 95 N. Y. Supp. 339; *Burrowes Co. v. Rapid Safety Filter Co.*, 49 Misc. 539, 97 N. Y. Supp. 1048.

**3858 n. 43.** *Nichols v. Eustis*, 146 App. Div. 475, 131 N. Y. Supp. 265.

**3858 n. 46.** *Bornstein v. Faden*, 149 App. Div. 37, 133 N. Y. Supp. 608. But see ante, **2291 n. 665**.

**3859 n. 49.** *Crandall v. Patterson*, 72 Misc. 410, 130 N. Y. Supp. 214.

**3859 n. 50.** *Jardine, Matheson & Co. v. Hogue Silk Co.*, 203 N. Y. 273, 96 N. E. 449; *People v. Thompson*, 198 N. Y. 396; 91 N. E. 838; *Knauss v. Webber Constr. Co.*, 156 App. Div. 39, 141 N. Y. Supp. 11; *Hopper v. Wilcox*, 151 App. Div. 113, 135 N. Y. Supp. 384; *Singer v. National Fire Ins. Co.*, 154 App. Div. 783, 139 N. Y. Supp. 375; *Mulligan v. McDonald*, 135 App. Div. 536, 120 N. Y. Supp. 522.

**3859** § 2784. Omission of necessary evidence cannot be supplied by affidavit on a motion for reargument. *Archer v. Archer*, 132 N. Y. Supp. 150. Opinion in a former trial cannot be considered. *Shaw v. Shaw*, 155 App. Div. 252, 140 N. Y. Supp. 109. Exceptions not appearing in the record cannot be considered. *North v. People's Bank of Buffalo*, 147 App. Div. 203, 131 N. Y. Supp. 911.

**3859** n. 54. *Kahl v. New York City R. Co.*, 53 Misc. 566, 103 N. Y. Supp. 872; *Devine v. Kerwin*, 52 Misc. 535, 102 N. Y. Supp. 841. Order not returned to the appellate court cannot be reviewed. *Liberman v. Beck*, 138 N. Y. Supp. 318. Where a complaint is dismissed on the opening of counsel but such opening does not appear in the appeal book, it will be presumed that the opening followed the lines of the complaint. *Cottrell v. Albany Card, etc., Co.*, 142 App. Div. 148, 126 N. Y. Supp. 1070. Judicial notice, see *Shaw v. Shaw*, 155 App. Div. 252, 140 N. Y. Supp. 109.

**3860** n. 61. *Price v. Western Distillery Co.*, 114 N. Y. Supp. 714. That rule is abrogated by Code amendment, at least so far as Court of Appeals is concerned, see ante, **2788** n. 225. Compare ante, **3802** n. 51.

**3860** § 2785. Misconduct of attorney in frequently and persistently alluding to a former trial is ground for reversal. *Walter v. Joline*, 136 App. Div. 426, 120 N. Y. Supp. 1025. Improper question, bringing out insurance company is defending personal injury case, is ground for reversal. *Perlman v. I. Blyn & Sons*, 155 App. Div. 888, 139 N. Y. Supp. 1082. "It is not every reference, however, to the matter of accident insurance that necessitates a reversal, and especially where the reference is made by the defendant itself, as a reason for not considering or investigating the claim when presented. The judgment should not be reversed unless the appellate court is satisfied that the verdict of the jury has been or may have been influenced by the improper testimony." *Rodzborski v. American Sugar Refining Co.*, 151

App. Div. 395, 398, 135 N. Y. Supp. 1063. Improper exclusion of questions as leading is reversible error. *Struad v. Wm. Messer Co.*, 142 N. Y. Supp. 314. Refusal to allow amendment of answer held reversible error. *Lichtenstein v. Konig*, 142 N. Y. Supp. 541. Order allowing amendment of pleadings after verdict is not reversible error where not prejudicial. *Peattie v. Gabel*, 155 App. Div. 786, 140 N. Y. Supp. 993. Allowance of amendment to complaint held harmless error. *Morse v. Canasawarta Knitting Co.*, 154 App. Div. 351, 139 N. Y. Supp. 634. Order too broad, where not availed of so far as erroneous, is harmless. *Onondaga County S'v'gs Bk. v. Robinson*, Nos. 1, 2, 150 App. Div. 64, 134 N. Y. Supp. 205. Improper conduct of counsel in putting opposing attorney on stand, and questioning him as to his opening statement to the jury, while inexcusable, held not ground for reversal. *Steinacher v. Sayles-Zahn Co.*, 145 App. Div. 241, 130 N. Y. Supp. 29.

**3861** n. 64. See *Matter of Sheldon*, 158 App. Div. 843, 144 N. Y. Supp. 94; *Smith v. Appleton*, 155 App. Div. 520, 140 N. Y. Supp. 565; *Weibert v. Hanan*, 136 App. Div. 388; 121 N. Y. Supp. 35; *Fine v. Lyons*, 141 N. Y. Supp. 295.

**3861** n. 67. *Hendrick v. Biggar*, 209 N. Y. 440, 103 N. E. 763; *Bilkovic v. Loeb*, 156 App. Div. 719, 141 N. Y. Supp. 279; *Smith v. Appleton*, 155 App. Div. 520, 140 N. Y. Supp. 565; *Rimland v. Marcus*, 138 N. Y. Supp. 311. *Gherky v. State Line Telephone Co.*, 122 App. Div. 879, 107 N. Y. Supp. 420. And see *Hindley v. Manhattan R. Co.*, 185 N. Y. 335. Admission held harmless. *Sands v. Saltsman*, 139 N. Y. Supp. 862; *Richie v. Shepard*, 158 App. Div. 192, 143 N. Y. Supp. 19. Error in admitting evidence in a negligence suit that defendant is insured against liability is ground for reversal. *Akin v. Lee*, 206 N. Y. 20, 99 N. E. 85. "Evidence that the defendant in an action for negligence was insured in a casualty company, or that the defense was

conducted by an insurance company, is incompetent and so dangerous as to require a reversal even when the court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it could not have influenced the verdict." *Simpson v. Foundation Company*, 201 N. Y. 479. See also *Branoner v. Traitel Marble Co.*, 144 App. Div. 569, 571, 129 N. Y. Supp. 761.

**3861** n. 68. As where evidence admitted without objections shows that respondent was entitled to the judgment. *Meekins v. Kinsella*, 152 App. Div. 32, 136 N. Y. Supp. 806. Each case is determined by its own facts. *Mance v. Hossington*, 205 N. Y. 33, 98 N. E. 203.

**3861** n. 70. *Junkins v. Junkins*, 151 App. Div. 77, 135 N. Y. Supp. 830.

**3862**. Fact that referee was a lawyer of recognized ability and experience does not justify disregarding error in admitting evidence where he appears to have been influenced by such evidence. *Weibert v. Hanan*, 202 N. Y. 328, 95 N. E. 688.

**3862** n. 71. To same effect, see *Ventresca v. Beckwith*, 112 App. Div. 72, 98 N. Y. Supp. 134. Where other like evidence received without objection. *Zucker v. Whitridge*, 143 App. Div. 191, 128 N. Y. Supp. 233.

**3862** n. 74. See also *Willeys v. Poor*, 155 App. Div. 312, 140 N. Y. Supp. 299.

**3862** n. 75. *Hall v. Widger*, 158 App. Div. 239, 143 N. Y. Supp. 118.

**3862** n. 79. Matter of *Turner*, 208 N. Y. 261, 101 N. E. 905 [aff. 152 App. Div. 231, 136 N. Y. Supp. 512]. As where supplied by other evidence. *Borough Development Co. v. Harmon*, 154 App. Div. 689, 139 N. Y. Supp. 362.

**3862** n. 80. *Eilenburg v. Wax*, 140 N. Y. Supp. 372; *Averbuck v. Becher*, 140 N. Y. Supp. 483; *Frederick Figge Co. v. Stevenson*, 138 N. Y. Supp. 98. The burden is upon the

respondent to show that the reception of the evidence was harmless. *Gearty v. City of N. Y.*, 183 N. Y. 233.

**3863** n. 83. *Rose v. New York & H. R. Co.*, 108 App. Div. 206, 95 N. Y. Supp. 711. See also *Mayne v. Nassau Electric R. R. Co.*, 151 App. Div. 75, 136 N. Y. Supp. 375.

**3863** n. 84. That court states it disregarded testimony received contrary to statute does not make it harmless error. *Hartig v. Hartig*, 147 App. Div. 6, 131 N. Y. Supp. 587.

**3863** n. 87. *Hastings Land Imp. Co. v. Empire State Surety Co.*, 156 App. Div. 258, 141 N. Y. Supp. 417; *Muench v. Steel & Masonry Contrg. Co.*, 155 App. Div. 409, 140 N. Y. Supp. 330. Instructions held reversible error, see *McNulty v. Pickelmann*, 141 N. Y. Supp. 521; *Droste v. Wabash R. Co.*, 153 App. Div. 160, 138 N. Y. Supp. 203; *Schoolman v. Ratkowsky*, 141 N. Y. Supp. 527.

**3864** n. 92. If propositions charged are irreconcilable, new trial should be ordered. *Johnson v. Blaney*, 198 N. Y. 312, 91 N. E. 721.

**3864** n. 94. So as to findings on issues not referred. *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 151 App. Div. 465, 135 N. Y. Supp. 990.

**3864** n. 96. *White v. Moore*, 161 App. Div. 400. Inconsistencies in the conclusions of law do not require a reversal by the Appellate Division, under § 1317 of the Code as amended in 1912. *Cromwell v. Nichols*, 155 App. Div. 905, 139 N. Y. Supp. 1051.

**3864** n. 97. Appellate court, in deciding an issue of law, may affirm or reverse without regard to the grounds or reason stated in deciding such issue by the lower court. *Hirsch v. New England Nav. Co.*, 200 N. Y. 263, 93 N. E. 524.

**3865** n. 98. *Anderson v. Wood*, 50 Misc. 595, 99 N. Y. Supp. 474.

**3866** n. 115. *International Tailoring Co. v. Bennett*, 113 App. Div. 476, 99 N. Y. Supp. 438.

**3867** n. 120. *Daymon v. Westchester Street R. Co.*, 154 App. Div. 796, 139 N. Y. Supp. 751; *Silverstein v. Brown*, 153 App. Div. 677, 138 N. Y. Supp. 848; *Ketcham v. Stewart*, 153 App. Div. 940, 138 N. Y. Supp. 1124. The "law of the case" does not mean the application of the recognized rules of law to the proven facts, but is a precise application of the law as laid down by the trial judge, and, if erroneous, is ground for reversal, although such erroneous instruction is given at the request of the complaining party, and narrows the scope of his liability, and although upon the facts and the law a recovery would otherwise be upheld. *Paine v. Geneva, Waterloo, S. F. & C. L. Traction Co.*, 115 App. Div. 729, 101 N. Y. Supp. 204; *Egg v. Rochester R. Co.*, 115 App. Div. 805, 101 N. Y. Supp. 195; *Van Alstine v. Standard Light, Heat & Power Co.*, 116 App. Div. 100, 101 N. Y. Supp. 696; *Weeks v. Auburn & S. Electric R. Co.*, 60 Misc. 400, 113 N. Y. Supp. 636.

**3867** § 2791. See also ante, **3799** § 2791. Presumption where papers not printed in full in the record, see *Salomon v. North British, etc., Co.*, 150 App. Div. 728, 135 N. Y. Supp. 806. If, in an equity case, the trial court makes no finding, the judgment will be considered as one of nonsuit and not on the merits. *Stephenson v. Southerland*, 150 App. Div. 275, 134 N. Y. Supp. 474.

**3867** n. 122. *Flieg v. Levy*, 148 App. Div. 781, 133 N. Y. Supp. 249; *Maslon v. Sprickerhoff*, 50 Misc. 644, 98 N. Y. Supp. 618. See also *Macdonald v. Macdonald*, 112 App. Div. 330, 98 N. Y. Supp. 581. But if instructions are contradictory, appellant is entitled to rely on the instruction most favorable to his appeal. *Johnson v. Blaney*, 198 N. Y. 312, 91 N. E. 721.

**3868** n. 123. See also *People ex rel. Moriarty v. Creelman*, 206 N. Y. 570, 100 N. E. 446; *People ex rel. Wilson v. African W. M. E. Church*, 156 App. Div. 386, 141 N. Y. Supp. 394. Rule applies in favor of proceedings of an inferior court

except as to matters of jurisdiction. *People v. Pugliese*, 80 Misc. 75, 140 N. Y. Supp. 849.

**3868** n. 124. See *Engel v. United Traction Co.*, 203 N. Y. 321, 96 N. E. 731.

**3868** n. 125. *Janiszewski v. Fitzpatrick*, 157 App. Div. 199, 141 N. Y. Supp. 840.

**3868** n. 131. If grounds not stated, in order granting a motion to set aside a nonsuit and for a new trial affirmed by Appellate Division, it will not be presumed to amount to a decision that plaintiff established a prima facie cause of action. *Ozogar v. Pierce, Butler, etc., Co.*, 134 App. Div. 800, 119 N. Y. Supp. 405.

**3869**. Cannot assume that a finding was inadvertently made. *Stokes v. Stokes*, 198 N. Y. 301, 91 N. E. 793.

**3869** n. 134. *Callanan v. Keeseville, etc., R. R. Co.*, 199 N. Y. 268, 92 N. E. 747. "The rule is that when a fact is not expressly found and no request is made upon the subject, an appellate court will presume in support of the judgment but not to reverse it, that such fact was found provided it was conclusively proved and tends to support the express findings. Only to this extent can findings be implied." *Callahan v. Keeseville, etc., R. Co.*, 199 N. Y. 268, 282, 92 N. E. 747.

**3869** n. 136. The Appellate Division cannot assume the functions of a trial court and make a finding upon the evidence in order to sustain a judgment under review. *Levin v. Dietz*, 106 App. Div. 208, 94 N. Y. Supp. 419.

**3870**. If verdict is directed against defendant, he is entitled on appeal to the most favorable view which a jury might have taken of the evidence. *Lessler v. De Loynes*, 150 App. Div. 868, 135 N. Y. Supp. 948.

**3870** n. 146. *Kirwan v. American Lithographic Co.*, 197 N. Y. 413, 90 N. E. 945; *Flanagan v. Carlin Const. Co.*, 134 App. Div. 236, 118 N. Y. Supp. 953; *Gross v. Foster*, 134 App. Div. 243, 118 N. Y. Supp. 889.



**3871** § 2792. Appellant may urge as ground for reversal that findings of fact are inconsistent with the judgment entered. *McNulty Bros. v. Afferman*, 152 App. Div. 181, 137 N. Y. Supp. 27.

**3871** n. 148. *Moore v. Martine*, 107 N. Y. Supp. 652. Rule should be applied reasonably. *Onderkirk v. Bayless Pulp & Paper Co.* 199 N. Y. 366, 92 N. E. 798.

**3871** n. 149. *Stokes v. Stokes*, 198 N. Y. 301, 91 N. E. 793; *Johnson Service Co. v. Hildebrand*, 149 App. Div. 680, 134 N. Y. Supp. 187; *Doyle v. Hamilton Fish Co.*, 144 App. Div. 131, 128 N. Y. Supp. 898; *Whalen v. Stuart*, 194 N. Y. 495, 87 N. E. 819; *City of Buffalo v. Delaware, L. & W. R. Co.*, 190 N. Y. 84, 82 N. E. 513; *Bell v. James*, 128 App. Div. 241, 112 N. Y. Supp. 750; *Nickell v. Tracy*, 184 N. Y. 386, 77 N. E. 391. Appellants are entitled to benefit of those findings most favorable to them, where inconsistent. *Brewster v. Brewster Co.*, 145 App. Div. 812, 130 N. Y. Supp. 654. Rule does not apply where conclusion of law is improperly included in findings of fact. *McNally v. Georgia-Florida Lumber Co.*, 146 App. Div. 456, 131 N. Y. Supp. 295. Where the findings of fact are so diametrically opposed as to be necessarily irreconcilable, and the determination of the facts involved in the findings is material and necessary to uphold and establish the right of the properly successful party to a judgment, the judgment is without sufficient facts as a basis for its rendition and should be reversed, since appellant is entitled to the benefit of the findings most favorable to his contention. *Hamilton v. Fleckenstein*, 118 App. Div. 579, 103 N. Y. Supp. 631. The rule only applies to cases where there has been a conflict in the evidence touching a fact found, and has no application to a case where there is no evidence whatever to support one of the findings, and such finding was made contrary to the conces-

sions made by counsel in open court. *Stokes v. Stokes*, 128 App. Div. 838, 113 N. Y. Supp. 142.

**3871** § 2793. See *Goodman v. Welz & Zerweck*, 155 App. Div. 919, 140 N. Y. Supp. 1121. Decision of Appellate Division as to weight of evidence is conclusive only as to the trial reviewed. *Sticht v. Buffalo Cereal Co.*, 195 N. Y. 70, 87 N. E. 801. Ordinarily an interlocutory judgment passed upon by the appellate court establishes the law respecting the final judgment, except that where it is ambiguous it will not be interpreted so as to do manifest injustice. *Hasell v. Buckley*, 118 App. Div. 356, 103 N. Y. Supp. 377.

**3871** n. 152. *Gunderson v. Roebling Constr. Co.*, 156 App. Div. 16, 141 N. Y. Supp. 290; *Naffa v. Erie R. Co.*, 155 App. Div. 9, 139 N. Y. Supp. 547; *White v. Schweitzer*, 154 App. Div. 942, 139 N. Y. Supp. 1149; *Title Guarantee & T. Co. v. Haven*, 154 App. Div. 652, 139 N. Y. Supp. 207; *First Natl. Bank v. Story*, 140 N. Y. Supp. 31; *Merkel v. Lazard*, 124 App. Div. 934, 109 N. Y. Supp. 577. Where evidence on new trial tends to overcome reasons for decision of Court of Appeals, such decision is not binding. *Reilly v. Troy Brick Co.*, 125 App. Div. 326, 109 N. Y. Supp. 476. A decision of the old general term is *res judicata* on a subsequent appeal to the Appellate Division. *Jones v. Jones*, 118 App. Div. 148, 103 N. Y. Supp. 141. Ruling of Court of Appeals on first appeal is binding on Appellate Division on a second appeal. *La Montague v. Bank of New York*, 141 App. Div. 250, 125 N. Y. Supp. 1104.

**3872** § 2794. Reversal by Appellate Division is on the facts where the appeal to that court from a trial by a court with specific questions submitted to a jury is reviewed on the facts. *Carroll v. Bullock*, 207 N. Y. 567, 101 N. E. 438. If there is evidence to sustain the finding, disbarment of attorney will not be reversed. *Matter of Robinson*, 209 N. Y. 354, 103 N. E. 160 [aff. 151 App. Div. 589, 136 N. Y. Supp. 548]. Inferences of fact cannot be drawn from the

facts within the stipulated case, on a submitted controversy. *Bradley v. Crane*, 201 N. Y. 14, 94 N. E. 359. But meaning and effect of papers, considered by the Appellate Division although not in the record, may be reviewed and a different effect given thereto. *Tiffany v. Oyster Bay*, 209 N. Y. 1, 102 N. E. 585 [rev. 141 App. Div. 720, 126 N. Y. Supp. 910]. Irregularity in a verdict finding for plaintiff in a particular sum, in recommending the clemency of the court for certain defendants, is not reviewable in the Court of Appeals, where the form of the verdict was corrected by direction of the trial judge. *Downey v. Finucane*, 205 N. Y. 251, 98 N. E. 391.

**3872** n. 155. *People ex rel. Stephenson v. Bingham*, 205 N. Y. 168, 98 N. E. 384 [aff. 132 App. Div. 345].

**3872** n. 156. *People ex rel. Bingham v. State Water Supply Comm.*, 209 N. Y. 299, 103 N. E. 162 [aff. 153 App. Div. 581, 138 N. Y. Supp. 746].

**3873** § 2795. If the granting or withholding of a permanent injunction is within the absolute discretion of the Supreme Court, the exercise of that discretion by the Appellate Division is beyond the power of the Court of Appeals to review; but if the facts found compel the conclusion as matter of law that an injunction should be refused, as inequitable, the Court of Appeals may reverse. *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961.

**3873** n. 158. *People ex rel. Toms v. Supervisors of Erie*, 199 N. Y. 150, 92 N. E. 389; *Matter of Curtiss*, 199 N. Y. 36, 92 N. E. 396; *Matter of Droege*, 197 N. Y. 44, 90 N. E. 340; *Knickerbocker Trust Co. v. Oneonta, etc., R. Co.*, 197 N. Y. 391, 90 N. E. 1111; *Gittleman v. Feltman*, 191 N. Y. 205, 83 N. Y. 969. Thus exceptions to the remarks of counsel in summing up are not reviewable. *Reehil v. Fraas*, 197 N. Y. 64, 90 N. E. 340. In proceedings to suspend attorney from practice, see *Matter of Goodman*, 199 N. Y. 143, 92 N. E. 211.

**3873** n. 165. *Sherrill v. O'Brien*, 186 N. Y. 1, 79 N. E. 7, (writ of mandamus).

**3874** § 2796. Where there is no dispute as to the material facts, whether a case is difficult and extraordinary so as to warrant an extra allowance is a question of law. *Campbell v. Emslie*, 188 N. Y. 509, 81 N. E. 458. Where the decision on a motion for a nonsuit is reserved, a general verdict for plaintiff is rendered, and on defendant's motion for a new trial such motion is disregarded and the nonsuit granted, the only question arising on appeal is the propriety of the nonsuit. The verdict cannot be reinstated and judgment ordered thereon. *Paltey v. Egan*, 200 N. Y. 83, 93 N. E. 267. A motion for a nonsuit involves only a question of law, and hence is reviewable by the Court of Appeals. This is so although the order reversing a judgment of nonsuit, which is appealed from, recites that the reversal is upon the law and the facts. *Kraus v. Birnbaum*, 200 N. Y. 130, 93 N. E. 474. Comments of trial judge, within reasonable bounds, are not legal error reviewable in the Court of Appeals. *Cross v. Syracuse*, 200 N. Y. 393, 94 N. E. 184. Whether there was any evidence to support a direction of a verdict is a question of law reviewable in the Court of Appeals. *Clancy v. N. Y., N. H. & H. R. Co.*, 201 N. Y. 235, 94 N. E. 867. Objections not urged in Appellate Division cannot be reviewed, on appeal from dismissal of a writ of certiorari. *People ex rel. N. Y. C. & H. R. R. Co. v. Public Service Comm.*, 208 N. Y. 589, 102 N. E. 1111.

**3875** § 2797. Whether jury properly construed records cannot be considered where no objection was made to their consideration by the jury and no exception taken to the charge submitting them to the jury. *North Hempstead v. Oelsner*, 208 N. Y. 626, 102 N. E. 1114 [aff. 148 App. Div. 779, 133 N. Y. Supp. 319]. Exceptions to refusal to charge are reviewable. *Cornwell v. Sanford*, 208 N. Y. 126, 101 N. E. 709.

**3875** n. 171. *Kinser Construction Co. v. State of N. Y.*,

204 N. Y. 381, 97 N. E. 871; *Kissam v. U. S. Printing Co.*, 199 N. Y. 76, 92 N. E. 214. If two justices dissent, even on questions of law, it does not show a unanimous affirmance on the facts. *Taylor v. Higgs*, 202 N. Y. 65, 95 N. E. 30. While a refusal, by a trial court or referee, to find a fact as requested may always be reviewed by the Appellate Division upon an exception taken thereto under the statute (Code Civ. Proc., 1023, as amend. by L. 1904, c. 491), the Court of Appeals will not review such refusal where the fact which the trial court has been requested to find is a fact directly in conflict with a fact actually found by the trial court as the basis of its decision, or a fact which would necessarily nullify such finding, and where the finding of fact as made has the support of an unanimous affirmance by the Appellate Division. *Le Genrde v. Scottish Union & Nat. Ins. Co.*, 183 N. Y. 392, 76 N. E. 472.

**3875 n. 172.** Though the Court of Appeals may be bound to accept and consider the existence of any issuable or traversable facts stipulated by the parties on the trial, it is not so bound as to mere evidentiary facts, i. e., those which it is not necessary to allege or plead but constitute only evidence from which the issuable or traversable facts can be determined. *Continental Ins. Co. v. New York & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026.

**3876.** The Court of Appeals may, however, consider the admissions in the pleadings to ascertain whether the facts so admitted and found sustain the judgment. *Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 76 N. E. 1075. The Court of Appeals is confined to the findings of facts although the party has had no opportunity to obtain at Special Term a ruling upon additional facts deemed to be established by the evidence. *Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 76 N. E. 1075.

**3877 n. 184.** See *Miller v. New York & N. S. R. Co.*, 183 N. Y. 123, 75 N. E. 1111.

**3877** n. 185. *International Ferry Co. v. Amer. Fidelity Co.*, 207 N. Y. 350, 101 N. E. 160.

**3878** n. 190. See also *Arnot v. Union Salt Co.*, 186 N. Y. 501 (holding that where the affirmance is not unanimous, an exception to refusals to find are available to the appellant). Where a judgment on a report is affirmed by a divided court, the Court of Appeals must determine from a study of the record whether or not any finding of fact is entirely devoid of support in the evidence, or any proposed finding of the appellants, sustained by uncontradicted evidence, would have required a legal conclusion favorable to them, if found additionally to the existing findings. *Costello v. Costello*, 209 N. Y. 252, 103 N. E. 148.

**3878** n. 193. See also *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961.

**3880** n. 202. *Hirsch v. Jones*, 191 N. Y. 195, 83 N. E. 786.

**3881** n. 205. *Kerker v. Levy*, 206 N. Y. 109, 99 N. E. 181; *Hirsch v. Jones*, 191 N. Y. 195, 83 N. E. 786.

**3881** n. 207. *Hirsch v. Jones*, 191 N. Y. 195, 83 N. E. 786.

**3881** n. 209. *Kraus v. Birnbaum*, 200 N. Y. 130, 93 N. E. 474.

**3882** n. 211. *Seeman v. Levine*, 205 N. Y. 514, 99 N. E. 158; *Lenox v. Lenox*, 195 N. Y. 359, 88 N. E. 571 [reversing on other grounds 126 App. Div. 105, 110 N. Y. Supp. 282]; *Ball v. Broadway Bazaar*, 194 N. Y. 429, 87 N. E. 674; *Butler v. Wright*, 186 N. Y. 259; *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961. Where judgment modified, it will be presumed to have been made solely on questions of law, where not purporting to be on questions of fact. *McGibbon v. Tarbox*, 205 N. Y. 271, 98 N. E. 390. Questions presented are whether the relief granted was warranted by the facts found, whether any material finding of fact was without evidence to support it, and whether prejudicial error exists in the admission or exclusion of evidence. *McKinley v. Hessen*, 202 N. Y. 24, 95 N. E. 32. As amended in 1912 the

section applies also to the reversal of a judgment entered upon "the verdict of a jury" or from an order granting a new trial, upon such a reversal; and the latter part of the section, as amended, makes the presumption conclusive unless the "particular question or questions of fact upon which the reversal was made or the new trial was granted are specified and referred to by number or other adequate designation in the" body of the judgment or order appealed from. The matter quoted is all new.

**3882** n. 214. Rule changed by 1912 amendment (see ante, **3882** n. 211).

**3882** § 2800. See ante, **3882** n. 211, as to change by 1912 Code amendment. Whether there is "any" evidence to support the findings of negligence and freedom from contributory negligence is reviewable. *Hickok v. Auburn Light, etc., Co.*, 200 N. Y. 464, 93 N. E. 1113. Weight of evidence not reviewable. *McCaffrey v. Baltimore & Ohio R. R. Co.*, 201 N. Y. 115, 94 N. E. 624. Where the reversal is solely on questions of law, the Court of Appeals can consider only questions of law. *Serano v. New York Cent. & H. R. R. Co.*, 188 N. Y. 156, 80 N. E. 1025.

**3883**. Notwithstanding the 1912 amendment of section 1338 of the Code by providing that where the judgment of the Appellate Division is silent as to the grounds of reversal, it will be presumed that the reversal was not on a question of fact, questions of law cannot be reviewed in a jury trial, where the appeal is from the judgment and the order denying a new trial and the Appellate Division reverses and grants a new trial, where it does not affirmatively appear that the order denying the motion for a new trial was affirmed "on the facts" or the appeal therefrom dismissed. *Wright v. Smith*, 209 N. Y. 249, 103 N. E. 154.

**3883** n. 218. "The order and judgment of the Appellate Division are silent as to the grounds thereof. It must, therefore, be conclusively presumed that the reversal was not on a

question of fact. (Section 1338, Code Civil Procedure, as amended by chap. 361 of the Laws of 1912.) But this court has repeatedly said that it could not entertain jurisdiction in such a case as this even though it should conclusively appear that the decision below was based on questions of law only, that it must affirmatively appear that the order denying the motion for a new trial was affirmed on the facts or the appeal therefrom dismissed. \* \* \* We do not know how to make language more explicit, and yet the attitude of counsel in this case and the amendment of 1912, said to have been recommended by the State Bar Association, indicate that the subject is not understood by the bar. The confusion doubtless results from the failure to perceive the distinction which still exists between cases at law and in equity. Under the Chancery practice the court on appeal granted the judgment which should have been rendered in the first instance and under the Code of Civil Procedure the Appellate Division is required, on an appeal from a judgment entered on the report of a referee or the decision of the court on a trial without a jury, to review all questions of fact and law and is empowered to grant the judgment which the facts warrant. (Code of Civil Procedure, § 993.) A reversal on questions of law only, which is presumed unless the contrary appears, imports that the facts as found by the trial court or the referee are affirmed, and on appeal to this court the questions of law arising on those facts are reviewed. But in jury cases the rule is different. The appeal from the judgment brings up the exceptions only. (Code Civil Procedure, § 1346; *Collier v. Collins*, 172 N. Y. 99; *Alden v. Knights of Macabees*, 178 N. Y. 535.) The facts can be reviewed only by an appeal from an order denying a motion for a new trial. (*Thurber v. Harlem B., M. & F. R. R. Co.*, 60 N. Y. 326; *Boos v. World Mutual Life Ins. Co.*, 64 N. Y. 236.) When the appeal is both from the judgment and an order denying a motion for a new trial the Appellate Division may reverse



on the exceptions without passing on the weight of evidence, and in such case, as has often been pointed out, if this court should entertain the appeal and reverse the judgment of the Appellate Division, it would result in depriving the defeated party of the right which the law gives him to have the facts reviewed by the Appellate Division." *Wright v. Smith*, 209 N. Y. 249, 103 N. E. 154.

**3884** § 2803. See also ante, **3621** n. 131.

**3885** n. 226. Review limited to exceptions taken at the trial where no motion for a new trial is made. *Porges v. U. S. Mortgage & Trust Co.*, 203 N. Y. 181, 96 N. E. 424.

**3886** § 2806. Judgment will be reversed where verdict is a compromise one. *Spinafont v. H. G. Vogel Co.*, 81 Misc. 127, 142 N. Y. Supp. 177. If general verdict is based on two issues, and there is no evidence to support one of them, judgment should be reversed. *Pettit v. Pettit*, No. 1, 149 App. Div. 485, 134 N. Y. Supp. 133. Where two affirmative defenses are submitted to the jury, and there is a general verdict for defendant, a reversal is required where either question was improperly submitted, unless the evidence as to the other issue was uncontroverted and clearly established the defense. *Makepeace v. Ferris*, 132 N. Y. Supp. 780. Weight of evidence and whether the case was tried on a wrong theory may be reviewed on appeal from an order denying a new trial, although there are no exceptions. *Spencer v. Hardin*, 149 App. Div. 667, 134 N. Y. Supp. 373.

**3886** n. 234. This provision was amended in 1914 (c. 351) by adding the words "or upon the facts or upon both." It seems that it dispenses with the necessity for a motion for a new trial in order to review the facts, and makes the rule the same as on appeal from a judgment rendered on a trial by a referee or without a jury (see following section **3887**).

**3886** n. 235. *Burkan v. Musical Courier Co.*, 156 App. Div. 205, 140 N. Y. Supp. 1089; *Fogarty v. Pittsburgh Constr. Co.*, 152 App. Div. 409, 137 N. Y. Supp. 589; *Pang-*

burn v. Buick Motor Co., 151 App. Div. 756, 137 N. Y. Supp. 37; Rosenberg v. People's Surety Co. of N. Y., 140 App. Div. 436, 125 N. Y. Supp. 257; Pease v. Penna. R. R. Co., 137 App. Div. 458, 122 N. Y. Supp. 784; Gillan v. O'Leary, 124 App. Div. 498, 108 N. Y. Supp. 1024. In such a case the question whether the verdict is against the evidence is not reviewable. Pangburn v. Buick Motor Co., 151 App. Div. 756, 137 N. Y. Supp. 37. That case went to jury on a wrong theory to which no exception was taken does not authorize a new trial. Pangburn v. Buick Motor Co., 151 App. Div. 756, 137 N. Y. Supp. 37. If verdict is against one joint tort feisor, and acquits the other, judgment cannot be reviewed on that ground. Pangburn v. Buick Motor Co., 151 App. Div. 756, 137 N. Y. Supp. 37. Verdict of jury on issues submitted to them in an equity suit is conclusive on appeal where there is no motion for a new trial. Curnen v. Curnen, 155 App. Div. 536, 140 N. Y. Supp. 805.

**3886** n. 236. Blumbert v. Hoes, 127 App. Div. 547, 111 N. Y. Supp. 823.

**3887.** If appeal is from judgment entered on a motion for a nonsuit based on special findings of a jury, the review is limited to the nonsuit where no verdict was rendered on the special findings. Carlin v. N. Y., New Haven, etc., R. R. Co., 135 App. Div. 876, 120 N. Y. Supp. 261.

**3887 § 2807.** Findings will be reversed where against the weight of evidence. Drummond v. Kunstler, 158 App. Div. 914, 143 N. Y. Supp. 1114. Facts may be reviewed where specific questions are submitted to a jury even in the absence of an appeal from an order granting or denying a new trial. Carroll v. Bullock, 207 N. Y. 567, 101 N. E. 438. Where no findings, only questions for review are those of law. Stephenson v. Southerland, 150 App. Div. 275, 134 N. Y. Supp. 774. Where no motion for a new trial, it seems that rulings may be based on admitted allegations in the pleadings and facts in the decision and also the findings.

Nicoud v. New York Life Ins. Co., 149 App. Div. 784, 134 N. Y. Supp. 119. Failure to submit proposed findings of facts and law does not, it seems, preclude the right to review the decision as to the weight of evidence, on exceptions to findings without evidence. Dann v. Palmer, 151 App. Div. 151, 135 N. Y. Supp. 411. Inasmuch as the court may, where issues have been sent to a jury, adopt the verdict of the jury and find accordingly, or may disregard it and make its own findings, the case is to be reviewed on appeal on the findings and decision of the court, as if there had been no submission of any fact to the jury. Hackett v. View, 109 App. Div. 351, 95 N. Y. Supp. 675. The conclusions drawn by a referee appointed to hear and determine an equitable action are not conclusive upon the Appellate Division on an appeal from the judgment entered upon the referee's report. Tanner v. Eckhardt, 107 App. Div. 79, 94 N. Y. Supp. 1013. That judgment was prematurely entered is not ground for reversal but only for a motion to set aside the judgment. O'Neil v. Franklin Fire Ins. Co., 159 App. Div. 317, 145 N. Y. Supp. 432.

**3887** n. 243. Review of the facts may be had where case states that it contains all of the evidence. Wilmarth v. Heine, 137 App. Div. 526, 121 N. Y. Supp. 677.

**3888** n. 249. Adams v. Bristol, 126 App. Div. 660, 111 N. Y. Supp. 231.

**3889** § 2809. Discretion in disallowing costs in an equity action is not reviewable. Huking v. Whigan, 136 App. Div. 675, 121 N. Y. Supp. 424. Granting of temporary injunction will not ordinarily be reviewed. Greer v. Smith, 155 App. Div. 420, 140 N. Y. Supp. 43. But granting of temporary injunction will be reviewed when plaintiff is not entitled to an injunction even on his own version of the disputed facts. Greene v. Faber, 158 App. Div. 149, 143 N. Y. Supp. 27.

**3889** n. 251. Rule applied to amendments of pleadings

and terms imposed. *Deitch v. Deitch*, 161 App. Div. 492, 147 N. Y. Supp. 1106. Discretion of judge in examining witnesses, where abused, is ground for reversal. *Dreyer v. Ershowsky*, 156 App. Div. 27, 140 N. Y. Supp. 819. Discretion of Special Term is reviewable. *Finn v. Scottish Union, etc., Co.*, 137 App. Div. 60, 122 N. Y. Supp. 37. Discretion of Special Term on motion to open default is reviewable. *Heiliger v. Ritter*, 78 Misc. 264, 138 N. Y. Supp. 212. Discretion in granting or denying a motion to set aside an inquisition of damages is reviewable on appeal in the Appellate Division. *Trieber v. New York & Q. C. R. Co.*, 149 App. Div. 804, 134 N. Y. Supp. 267.

**3889** n. 252. *Pietrarolia v. New Jersey & Hudson River Ry. Co.*, 197 N. Y. 434, 91 N. E. 120; *Uttal v. Uttal*, 140 App. Div. 255, 125 N. Y. Supp. 2; *Heiliger v. Ritter*, 78 Misc. 264, 138 N. Y. Supp. 212.

**3889** § 2810. Where an application for a dismissal of the complaint was not made until more than a month after the jury had disagreed, the order of dismissal need not be accepted to, in order to be reviewable on appeal. *Shafer v. New York Life Ins. Co.*, 149 App. Div. 797, 134 N. Y. Supp. 86.

**3889** n. 255. *Carroll v. Bullock*, 207 N. Y. 567; *Bissell v. Myton*, 160 App. Div. 268; 145 N. Y. Supp. 591; *Witte v. Koerner*, 123 App. Div. 824, 108 N. Y. Supp. 560.

**3890** § 2811. Rulings at trial will be carefully scrutinized where the appellate court believes that a different verdict would have been justified on the facts but it hesitates to disturb the ruling of the trial judge refusing to set aside the verdict as against the weight of evidence. *Nardi v. Richmond Light & R. Co.*, 153 App. Div. 388, 138 N. Y. Supp. 496.

**3890** n. 256. *Phelan v. New York, N. H. & H. R. R. Co.*, 158 App. Div. 911, 143 N. Y. Supp. 545; *Engineer Co. v. Herring-Hall-Marvin Safe Co.*, 158 App. Div. 913, 143

N. Y. Supp. 1116; *Kidney v. Gray*, 154 App. Div. 193, 138 N. Y. Supp. 834; *Young v. Stillwater Crushed Stone Co.*, 153 App. Div. 453, 138 N. Y. Supp. 539; *Kuntz v. Howard*, 143 App. Div. 830, 128 N. Y. Supp. 101; *Fitzpatrick v. Knights of Columbus*, 143 App. Div. 540, 128 N. Y. Supp. 366; *Mieuli v. New York & Q. County R. Co.*, 136 App. Div. 373, 120 N. Y. Supp. 1078. See *Hoye v. Bridgewater*, 134 App. Div. 255, 118 N. Y. Supp. 951; *Ozogar v. Pierce, Butler, etc., Co.*, 134 App. Div. 800, 119 N. Y. Supp. 405.

**3890** n. 258. *Lawrence v. Wilson*, 107 App. Div. 365, 95 N. Y. Supp. 147.

**3891** n. 261. "Absence" of evidence is ground for reversal notwithstanding three successive trials all resulting alike. *Barnett v. Anheuser Busch Agency*, 80 Misc. 151, 140 N. Y. Supp. 1029. Rule that court will hesitate to interfere with discretion of trial court in granting a new trial has less force after a second verdict, and does not apply where a new trial has been granted because verdict entirely without evidence. *Taylor v. Glens Falls Automobile Co.*, 161 App. Div. 445.

**3892**. Where there is no evidence to support it, judgment will be reversed. *Gold v. Reiter*, 141 N. Y. Supp. 483. Refusal of County Court to exercise its discretion as to granting a new trial in a justice's action is reviewable. *Casey v. Wheaton*, 157 App. Div. 140, 141 N. Y. Supp. 985.

**3892** n. 267. If a verdict is set aside as against the weight of evidence by the trial court, the appellate court should not reverse unless it clearly appears that injustice has been done or there has been an abuse of discretion. *Anderson v. Wood*, 50 Misc. 595, 99 N. Y. Supp. 474.

**3893** n. 270. Appeal from order denying a motion for a new trial brings up for review all errors committed below. *Laing v. Hudgens*, 82 Misc. 388, 143 N. Y. Supp. 763.

**3893** § 2813. May review any exercise of discretion by the Special Term. *Juskovitz v. Rafsky*, 130 N. Y. Supp. 839.

## CHAPTER XVII

## RELIEF GRANTED AND SUBSEQUENT PROCEDURE

**3897** § 2817. On appeal from an order made on defendant's motion for judgment on the pleadings, giving plaintiff judgment on the pleadings, the appellate court cannot give plaintiff judgment on the pleadings although he is entitled thereto. *Jamaica Water Supply Co. v. Hill*, 157 App. Div. 894, 142 N. Y. Supp. 1124. Where appellate court sustains a demurrer to an answer, determination of right to plead over will be remitted to the lower court where appellate court not sufficiently advised as to the merits. *Schnabel v. Hanover Natl. Bank*, 78 Misc. 35, 137 N. Y. Supp. 727.

**3898** § 2818. "The amendment to section 1317 of the Code of Civil Procedure, which took effect September 1, 1912, provides that after hearing an appeal the court must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." *Donnelly v. McArdle*, 152 App. Div. 805, 137 N. Y. Supp. 801.

**3898** n. 18. Compare *Rowan v. Sussdorff*, 147 App. Div. 673, 132 N. Y. Supp. 550. Rule not applicable where, under a proper application of legal rules, substantial damages are recoverable on competent proofs. *Stevens v. Amsinck*, 149 App. Div. 220, 133 N. Y. Supp. 815.

**3900** § 2821. Where essential justice seems to be lacking, and one of the two claims is against the weight of evidence, the whole case should be sent back for a new trial. *Siebrecht v. Siebrecht*, 153 App. Div. 227, 137 N. Y. Supp. 1073. Court of Appeals may affirm as to one cause of action and reverse as to the other where the causes are separate and distinct. *Bremer v. Manhattan R. Co.*, 191 N. Y. 333, 84 N. E. 59. Where two or more tort-feasors are joined, although the negligence of each is predicated on different

facts, a reversal as to one defendant does not require a reversal as to all. *Draper v. Interborough Rapid Transit Co.*, 124 App. Div. 357, 108 N. Y. Supp. 691 [disapproving *Bamberg v. International R. Co.*, 121 App. Div. 1, 105 N. Y. Supp. 621].

**3900** n. 27. Judgment held not entire. *Schultz v. U. S. Fidelity, etc., Co.*, 134 App. Div. 260, 118 N. Y. Supp. 977.

**3901** n. 30. See also *Henderson v. Jackson Amus. Co.*, 158 App. Div. 874, 142 N. Y. Supp. 701.

**3901** § 2822. See also post, **3928** n. 215. On setting aside a nonsuit granted after a special verdict, Appellate Division will order judgment on the verdict unless there are exceptions which require a new trial. *Herman v. Fitzgibbons Boiler Co.*, 136 App. Div. 286, 120 N. Y. Supp. 1074. Appellate Division cannot modify the interlocutory judgment and reverse the final judgment without directing a new trial. *Seaward v. Davis*, 198 N. Y. 415, 91 N. E. 1107. Judgment absolute should not be ordered unless the court is of the opinion that respondent could not be entitled to relief under any state of facts. *Seaward v. Davis*, 198 N. Y. 415, 91 N. E. 1107. Where evidence not returned in action for a separation, judgment without ordering a new trial held improper. *Robinson v. Robinson*, 146 App. Div. 533, 131 N. Y. Supp. 260. If order imposing a fine in contempt proceedings is reversed as excessive, proceeding should be remitted unless respondent stipulates for a reduction. *Westervelt v. Shapiro*, 132 N. Y. Supp. 744. If material facts are shown by documentary evidence, judgment absolute dismissing the complaint is proper, where it is not claimed that a new trial would change the facts. *Mercantile Nat. Bk. v. Silverman*, 148 App. Div. 1, 132 N. Y. Supp. 1017. Questions not considered on the merits below will be relegated to the lower court for decision. *McKee v. Preble*, 154 App. Div. 156, 138 N. Y. Supp. 915. Where

verdict should have been directed for defendant, but no motion was made therefor, the Appellate Division will merely reverse and order a new trial. *Mendelson v. Irving*, 155 App. Div. 114, 139 N. Y. Supp. 1065. On reversing a judgment dismissing the complaint at the close of plaintiff's evidence, court must order a new trial. *Follert v. Erikson*, 140 N. Y. Supp. 858. Appellate Division cannot finally dispose of a case where respondent on the trial rested on its point of law and offered no evidence as to damages. *Engineer Co. v. Herring-Hall-Marvin Safe Co.*, 154 App. Div. 123, 138 N. Y. Supp. 881. Where no evidence to support finding of negligence, complaint should be dismissed on reversing. *Lenahan v. New York*, 157 App. Div. 907, 142 N. Y. Supp. 1127. Conflicting findings as to material matters requires a reversal and new trial where the record is incomplete. *Schreiber v. Stern*, 156 App. Div. 196, 140 N. Y. Supp. 1094. Final judgment refused where additional evidence might develop a defense. *Borough Bank v. Lamphear*, 154 App. Div. 177, 138 N. Y. Supp. 864. New trial ordered where stipulations fixing amount of recovery, etc., not clear. *Barney v. Hoyt*, 150 App. Div. 361, 135 N. Y. Supp. 126. Affirmance of judgment of trial court on reversal of judgment of Appellate Division, see *Duclos v. Kelley*, 197 N. Y. 76, 89 N. E. 875. *Lachmann v. Young*, 141 N. Y. Supp. 337. Final judgment cannot be pronounced where the proper parties are not before the court on appeal, and in the absence of necessary findings. *Coleman & Krause v. Security Bank*, 161 App. Div. 715. On appeal to Appellate Term, new trial must be ordered where amount of judgment cannot be determined from the record. *Cole v. Lutz*, 139 N. Y. Supp. 323. Appellate Term will dismiss the complaint without ordering a new trial, where plaintiff was negligent as a matter of law. *Clarke v. N. Y. R. Co.*, 78 Misc. 646, 138 N. Y. Supp. 824. On appeal from City Court of Buffalo to Special Term of Supreme Court, see General



Fireproof Constr. Co. v. Butterfield, 143 App. Div. 708, 128 N. Y. Supp. 407.

**3902.** If defendant admitted in his answer part of plaintiff's cause of action, but a verdict of no cause of action is rendered, appellate court will direct judgment in plaintiff's favor for such part. Flaton v. Jefferson Bank, 135 App. Div. 24, 119 N. Y. Supp. 860.

**3902 n. 35.** Elliott v. Guardian Trust Co., 204 N. Y. 212, 97 N. E. 521; Fulton v. Krull, 200 N. Y. 105, 93 N. E. 494; Duclos v. Kelley, 197 N. Y. 76, 89 N. E. 875; Coventry v. McCreery, 144 App. Div. 68, 128 N. Y. Supp. 765. See Granger v. Empire State Surety Co., 116 N. Y. Supp. 973; American Guild v. Damon, 186 N. Y. 360, 78 N. E. 1081; Nicholls v. American Steel & Wire Co., 117 App. Div. 21, 102 N. Y. Supp. 227. New trial not ordered where only question involved is one of law, in fixing the amount of an account. Pringle Bros. v. Philadelphia Casualty Co., 153 App. Div. 180, 138 N. Y. Supp. 330. —

**3902 n. 36.** See Schwartz v. Smith, 143 App. Div. 297, 128 N. Y. Supp. 1.

**3902 n. 37.** Riker v. Gwynne, 201 N. Y. 143, 94 N. E. 632. See Lembeck & Betz Eagle Brewing Co. v. Sexton, 184 N. Y. 185, 77 N. E. 38. But see Central Trust Co. v. West India Imp. Co., 144 App. Div. 560, 129 N. Y. Supp. 730.

**3902 n. 38.** Farrell v. Farrell, 205 N. Y. 450, 98 N. E. 857. Court cannot strike out a specific finding of fact upon which the main part of the judgment was based, and affirm as so modified. Dennison Constr. Co. v. Manneschmidt, 204 N. Y. 404, 97 N. E. 859. Court cannot modify the judgment where it involves the exercise of power to make findings, even where the evidence is undisputed. Central Trust Co. v. Manhattan Trust Co., 151 App. Div. 629, 136 N. Y. Supp. 205.

**3903 n. 44.** American Guild v. Damon, 186 N. Y. 360, 78 N. E. 1081.

**3903 § 2823.** Appellate Division has inherent power of its own motion to conform judgment to unreversed part of a former judgment. *Mercantile Trust Co. v. Gunbernath*, 143 App. Div. 305, 128 N. Y. Supp. 751. On reversing the granting of a reserved motion for a nonsuit after a general verdict for plaintiff, the verdict cannot be reinstated and judgment ordered thereon. *Paltey v. Egan*, 200 N. Y. 83, 93 N. E. 267. Appellate court may modify judgment by striking out a provision therein. *Green v. Margolius*, 140 N. Y. Supp. 139. Order of lower court granting a new trial may be validated by inserting in the order the date for the new trial. *Epstein v. Schwartz & Co.*, 81 Misc. 142, 142 N. Y. Supp. 290. Cannot modify final judgment as to costs of interlocutory judgment which had been affirmed on a prior appeal. *Osborn v. Cardeza*, 208 N. Y. 131, 101 N. E. 806. Where County Court, on reversal, does not order a new trial, the Appellate Division, on a further appeal, may modify the order of reversal so as to direct the County Court to order a new trial. *Liedtke v. Meyer*, 137 App. Div. 74, 122 N. Y. Supp. 95.

**3903 n. 50.** *Goodrich v. Board of Education of Greenwich*, 137 App. Div. 449, 122 N. Y. Supp. 50; *Gilmour v. Concord*, 183 N. Y. 342, 76 N. E. 273. See also *Brush & Stephens Co. v. Ross*, 51 Misc. 44, 99 N. Y. Supp. 796. Omission from replevin judgment of an alternative provision for the return of the goods may be cured on appeal. *Scherl v. Flam*, 136 App. Div. 753, 121 N. Y. Supp. 522.

**3904.** Court of Appeals may reduce recovery and affirm instead of reversing, where some items are illegal. *Loomis v. Lehigh Valley R. Co.*, 208 N. Y. 312, 101 N. E. 907. Reversal may be conditional on refusal to consent to reduction. *Leavitt v. Enos*, 155 App. Div. 584, 140 N. Y. Supp. 862. Judgment should be reduced on appeal by deducting credits proved but not allowed. *University Garage v. Heiser*, 142 N. Y. Supp. 315. Reducing special franchise

tax assessment, see *People ex rel. N. Y. C. & H. R. R. Co. v. Woodbury*, 208 N. Y. 421, 102 N. E. 565.

**3904** n. 55. *Fisher v. Wakefield Park Realty Co.*, 135 App. Div. 808, 120 N. Y. Supp. 129.

**3905.** Where judgment of City Court of New York exceeds in amount the jurisdictional limit, it may be reduced to \$2,000 and affirmed if otherwise correct. *Lewkowicz v. Queen Aeroplane Co.*, 154 App. Div. 142, 138 N. Y. Supp. 983 [rev. 77 Misc. 151, 136 N. Y. Supp. 894; affirmed in 207 N. Y. 290, 100 N. E. 796]. Amount of warrant of attachment may be reduced on appeal. *J. D. Elwell & Co. v. Acme Portland Cement Co.*, 154 App. Div. 122, 138 N. Y. Supp. 1004. Under § 1317 of the Code as amended in 1912, reversal may be conditioned on refusal to allow amount of a note as an offset although it had not been pleaded as a counterclaim or set-off. *Van Denburg v. Scott*, 158 App. Div. 87, 143 N. Y. Supp. 310 [rev. 78 Misc. 281, 138 N. Y. Supp. 149].

**3907** § 2824. Clerical errors in a judgment will be corrected. *White v. Coughlin*, 135 N. Y. Supp. 546. Appellate court will not grant an amendment to conform to proof admitted over objection, where no motion to amend was made at the trial. *Blydenburgh v. Ely*, 161 App. Div. 91.

**3907** n. 72. The Appellate Term has the power. *Alexander v. Harkin*, 53 Misc. 317, 103 N. Y. Supp. 56.

**3907** n. 75. *Moore v. Martine*, 107 N. Y. Supp. 652.

**3909** § 2827. Not granted where appeal pending to Court of Appeals. *People v. Cornell*, 65 Misc. 452, 121 N. Y. Supp. 972.

**3909** n. 88. *People v. Santa Clara Lumber Co.*, 60 Misc. 150, 113 N. Y. Supp. 70.

**3910** n. 92. But where party has elected to resort to his motion which the appellate court refuses with leave to renew it at a later time, he cannot in the meantime bring an action

for restitution. *Drescher Rotberg Co. v. Landeker*, 82 Misc. 441, 143 N. Y. Supp. 1050.

**3910** n. 94. *Goepel v. Robinson Machine Co.*, 122 App. Div. 26, 106 N. Y. Supp. 990.

**3913** § 2828. Where the sustaining of a demurrer has been affirmed on appeal with leave to serve an amended complaint, but no amended pleading is served, final judgment may be entered dismissing the complaint on the merits. *Pollak v. Dodge Mfg. Co.*, 80 Misc. 182, 141 N. Y. Supp. 1104.

**3914** n. 127. See *Myers v. Lederer*, 119 App. Div. 332, 104 N. Y. Supp. 236.

**3914** n. 129. Cannot direct that judgment be satisfied by payment of less sum than that recovered. *Ferguson v. Bien*, 54 Misc. 88, 104 N. Y. Supp. 715.

**3914** § 2830. Reversal of order vacating an order for the examination of a defendant before trial carries with it the granting of the stay of proceedings pending defendant's examination denied at the same time the former order was vacated. *Ewen v. Hoefer*, 155 App. Div. 885, 139 N. Y. Supp. 1054. Order is valid until reversed although reversal is on the ground that the court had no power to make the particular order. *People ex rel. Republican & J. Co. v. Lazansky*, 208 N. Y. 435, 102 N. E. 556. Reversal of judgment leaves parties in same position as if there had been no trial. *Taylor v. N. Y. L. Ins. Co.*, 209 N. Y. 29, 102 N. E. 524. Reversal of order held to relieve successful party from conditions imposed by a prior order. *Young v. White*, 158 App. Div. 763, 143 N. Y. Supp. 934. Where, in an action against directors of a corporation, some of them appeal, a reversal of an interlocutory judgment against all prevents its enforcement against those who did not appeal. *Bauer v. Hawes*, 115 App. Div. 492. Reversal held not to inure to benefit of one who did not appeal, in condemnation proceedings. *Throne Paper Co. v. Syracuse*, 139 App. Div. 853, 124 N. Y. Supp. 317.

**3915 § 2831.** Although the Appellate Division affirms the order of the trial court setting aside a verdict for the plaintiff as against the weight of evidence, and granting a new trial, when such affirmance was made on the condition that the defendant pay the costs of trial or judgment be entered on the verdict, it is tantamount to a decision that the verdict was warranted by the evidence and it is error for the trial court to nonsuit on the same evidence at the second trial. *Larsen v. United States Mortgage, etc., Co.*, 113 App. Div. 483, 99 N. Y. Supp. 218.

**3916 n. 142.** See also *Rowe v. Gerry*, 109 App. Div. 156, 95 N. Y. Supp. 859.

**3916 n. 148.** But the opinion is not admissible in evidence. *Greitzer v. Ershowsky*, 47 Misc. 653, 94 N. Y. Supp. 258. Rule applied where Appellate Division had held one way and the Court of Appeals the other way, where a second judgment on the same evidence was appealed to the Appellate Division. *Milliken Bros. v. New York*, 156 App. Div. 930, 141 N. Y. Supp. 724. But affirmance of a Special Term order without opinion does not show adoption of views stated in opinion of Special Term. *Uvalde Asphalt Paving Co. v. New York*, 149 App. Div. 491, 134 N. Y. Supp. 50.

**3918 § 2833.** Where an order of the Appellate Division affirming an interlocutory judgment overruling a demurrer to the complaint grants leave to plead over conditionally, the affirmance of such an order in the Court of Appeals carries with it an affirmance of such leave to plead over; and it is not necessary under such circumstances that any express leave to withdraw the demurrer and interpose an answer should be granted by the Court of Appeals. *Cassidy v. Sauer*, 188 N. Y. 547, 80 N. E. 625.

**3918 n. 156.** *Gilmour v. Colcord*, 183 N. Y. 342, 76 N. E. 273 (holding that the court may modify the judgment of the Appellate Division by striking out a provision substituted by the latter and restoring the original provision). If affirmance

by Court of Appeals might establish a misleading precedent of practice, it will not affirm although reduction of verdict may have nullified the effect of an error. *Cook v. Mohawk*, 207 N. Y. 311, 100 N. E. 815.

**3918** n. 160. See *Tousey v. Hastings*, 194 N. Y. 79, 86 N. E. 831.

**3919** n. 166. *Matter of Mosher's Estate*, 185 N. Y. 435, 78 N. E. 145. Court of Appeals will affirm and direct judgment absolute with costs in all courts. *Van Slyck v. Woodruff*, 192 N. Y. 547, 84 N. E. 724.

**3920** § 2834. Where the Court of Appeals has overruled plaintiff's demurrer to a separate defense to the entire cause of action, and has remitted the case without granting leave to withdraw the demurrer, defendant is entitled, as a matter of law, to a final judgment dismissing the complaint. *National Contracting Co. v. Hudson River W. P. Co.*, 110 App. Div. 133, 97 N. Y. Supp. 92.

**3921** n. 176. This rule was amended in 1906 so as to require service by the attorney for the respondent.

**3922** n. 182. *Fulton v. Krull*, 151 App. Div. 142, 135 N. Y. Supp. 432. "The remittitur of the Court of Appeals is its mandate to the court to which it is returned, and the directions contained in it must be strictly followed in the final judgment which is to make the decision effective." *Fulton v. Krull*, 151 App. Div. 142, 144, 135 N. Y. Supp. 432. Lower court cannot make additional findings or correct alleged errors in the findings of facts. *Rudiger v. Coleman*, 148 App. Div. 682, 132 N. Y. Supp. 990. Where Court of Appeals affirms on stipulation for judgment absolute, Special Term must follow directions of remittitur and enter judgment absolute. *Whiting v. Fidelity Mut. Life Ass'n*, 150 App. Div. 157, 134 N. Y. Supp. 696. If there is any uncertainty as to the effect of the language employed in the remittitur or if there has been any oversight or inadvertence in its decision, the remedy is lodged exclusively with that court,

since its remittitur must be strictly construed. *Fulton v. Krull*, 151 App. Div. 142, 135 N. Y. Supp. 432.

**3925** n. 197. *People ex rel. Butterick Pub. Co. v. Purdy*, 208 N. Y. 620, 102 N. E. 1109.

**3925** n. 198. *Matter of Froment*, 185 N. Y. 553, 77 N. E. 1187.

**3926** § 2835. A verdict on an assessment of damages, under § 194 of the Code, cannot be set aside on a motion for a new trial on the judge's minutes, under § 999 of the Code. The motion should be to set aside the inquisition. *Triber v. New York & Q. C. R. Co.*, 149 App. Div. 804, 134 N. Y. Supp. 267.

**3926** n. 206. See also *Bornstein v. Faden*, 84 Misc. 257, 145 N. Y. Supp. 758.

**3927** § 2836. See also ante, **3901** § 2822. Affirmance is not an adoption of the reasoning of the trial court where grounds for affirmance exist other than those stated in the opinion of the trial court. *Casey v. Auburn Teleph. Co.*, 155 App. Div. 66, 139 N. Y. Supp. 579. If the denial of defendant's motion for judgment on the pleadings for plaintiff for nominal damages is reversed, where the complaint states no cause of action, the motion for nominal damages should be granted. *White v. Western Union Tel. Co.*, 153 App. Div. 684, 138 N. Y. Supp. 598. Where only issue is as to damages, prejudicial error either as to compensatory or exemplary damages requires a reversal. *Stearns v. Oppenheim*, 146 App. Div. 651, 131 N. Y. Supp. 533. "By the amendment of section 1317 of the Code of Civil Procedure (Laws of 1912, chap. 380), which went into effect the 1st of September, 1912, this court is commanded to give judgment after hearing the appeal, without regard to technical errors which do not affect the substantial rights of the parties." *Patnode v. Foote*, 153 App. Div. 494, 498, 138 N. Y. Supp. 221. Error in a ruling, or in failing to change a ruling, where cured by an instruction, is a technical rather than a substantial omission,

to be ignored under § 1317 of the Code. *Marion v. Coon Const. Co.*, 157 App. Div. 95, 141 N. Y. Supp. 647. The Appellate Division, on appeal, has power to do what the lower court should have done; and may impose the penalty for contempt in not obeying the order of the lower court. *Osterhoudt v. Prudential Ins. Co.*, 159 App. Div. 291, 145 N. Y. Supp. 1136. Power to modify as limited by the evidence, see *Beattie v. Peverly*, 153 App. Div. 577, 138 N. Y. Supp. 38.

**3927 n. 211.** The 1912 amendment of section 1317 of the Code strikes out the words "or general term" and substitutes "or appellate term."

**3927 n. 212.** The power conferred on the Appellate Division to modify a judgment, on appeal, is improperly exercised, when, on different views of, or inferences from, the facts in evidence, it determines the controverted questions for itself, incorporates such determination in its order and renders final judgment accordingly. *Putnam v. Lincoln Safe Deposit Co.*, 191 N. Y. 166, 83 N. E. 789 [reversing because thereof 118 App. Div. 468, 104 N. Y. Supp. 4]. This Code provision was amended in 1912 (c. 380) by adding the following: "It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon, according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing. When a trial has been before a jury, the judgment of the appellate court must be rendered either upon special findings of the jury or the general verdict, or upon a motion to dismiss the complaint or to direct a verdict." See *Peterson v. Ocean Electric R. R. Co.*, 161 App. Div. 726, 727; *Crowe v. Liquid Carbonic Co.*, 154 App. Div. 373, 139 N. Y. Supp. 587 [aff. in 208 N. Y. 396, 102 N. E. 573]. The amendment also adds at the end of the section the following sentence: "After hearing the appeal, the court must



give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." "The second, third and last sentences in this section as amended are new. Before the amendment of 1912 the first sentence was the same as it is now, excepting that the word 'appellate' was substituted for the word 'general' before the word 'term,' and excepting that after the last word of the sentence as it now appears, there was a semi-colon followed by a provision as follows: 'and it may, if necessary or proper, grant a new trial or hearing,' which has been eliminated and in substance incorporated in the next sentence." *Bonnette v. Molloy*, 153 App. Div. 73, 79, 138 N. Y. Supp. 67. "The Appellate Division has now been vested with authority to grant the final judgment which in its opinion should have been granted by the trial court, not only in all equity causes, but in all actions tried before the court without a jury, and in jury causes as well where the evidence was insufficient to require the submission of the case to the jury, and the question has been duly presented by a motion for the dismissal of the complaint, provided, however, that all material competent evidence offered by the respondent has been received." *Bonnette v. Molloy*, 153 App. Div. 73, 79, 138 N. Y. Supp. 67. "So far as concerns actions at law which have been tried before a jury it must be conceded at the outset that, if it appears upon appeal, though the judgment appealed from was erroneous, that there remains an issue of fact to be determined before the proper judgment can be rendered, a new trial should be ordered to the end that the disputed question of fact may be passed upon and determined by a jury. So much is required by the constitutional provision preserving inviolate the right of trial by jury. But cases frequently arise wherein, upon the undisputed evidence, the trial court should have disposed of the case without submitting it to the jury at all, either by dismissing the complaint or by directing a verdict

for one party or the other. In such a case, is the Appellate Division empowered to enter the judgment which the trial justice should have ordered without the useless formality, delay and added expense involved in sending the case back to Trial Term with instructions to enter the proper judgment? The language of section 1317 of the Code of Civil Procedure certainly seems to confer such authority. The Appellate Division is authorized, in addition to rendering judgment of affirmance or reversal, to render 'final judgment upon the right of any or all of the parties, or judgment of modification thereon, according to law, except where it may be necessary or proper to grant a new trial.' That this provision is intended to apply to actions at law, as well as suits in equity, is made clear by the following sentence: 'When a trial has been before a jury, the judgment of the appellate court must be rendered either upon special findings of the jury or the general verdict, *or upon a motion to dismiss the complaint or to direct a verdict.*' That is to say, if in an action tried before a jury a motion has been made to dismiss the complaint or to direct a verdict, which should have been granted but was not, the Appellate Division is authorized to render the judgment which should have been rendered at the trial. It would be difficult to frame a law more clearly giving power to the Appellate Division, in a case where there is no issue as to any material fact, to grant the judgment which should have been rendered at the Trial Term." *Peterson v. Ocean Electric R. R. Co.*, 161 App. Div. 720. Under such amendment it has been held as follows: (1) Appellate Division may restore a general verdict although it has been set aside under a reserved motion for a dismissal without taking a special verdict. *Dochtermann Van & Exp. Co. v. Fiss, D. & C. Horse Co.*, 155 App. Div. 162, 140 N. Y. Supp. 72. *Contra*, before amendment, see *Burns v. N. Y. & Long Island Traction Co.*, 139 App. Div. 145, 123 N. Y. Supp. 474; *Russell v. Rhinehart*, 137 App. Div. 843, 122 N. Y. Supp.

539. (2) Where lower court erroneously refused an instruction that plaintiff was entitled to nominal damages only, the Appellate Division, on setting aside a judgment for substantial damages, may award judgment for nominal damages. *Sandias v. Mustacchi*, 153 App. Div. 810, 138 N. Y. Supp. 875. (3) The "power of the Appellate Term to do justice by awarding such relief as the trial court should have awarded is not limited by the question whether or not any formal motion for such relief was made or any conclusion of law requesting such relief was submitted at the trial. To hold otherwise would substitute procedure for justice, contrary to the spirit and intent of section 1317." *Seeley v. Osborne*, 83 Misc. 409, 145 N. Y. Supp. 237. (4) The Appellate Division, upon undisputed facts may not only reverse the trial term but may also direct the judgment to be entered, without awarding a new trial. *Peterson v. Ocean Electric R. R. Co.*, 161 App. Div. 723. (5) Inconsistency of conclusions of law of trial court does not require reversal. *Cromwell v. Nichols*, 155 App. Div. 905, 139 N. Y. Supp. 1051. (6) Appellate Division on reversing a judgment for plaintiff, will enter final judgment for defendant dismissing the complaint, where plaintiff's evidence, none of which was erroneously rejected, was insufficient to send the case to the jury. *Pattison v. Livingstone Amus. Co.*, 156 App. Div. 368, 141 N. Y. Supp. 588. (7) Appellate Division, in a proper case, will enter judgment on a counterclaim although the trial court dismissed it. *Waterproofing Co. v. Hydrolithic Cement Co.*, 153 App. Div. 47, 138 N. Y. Supp. 265. (8) Appellate Division may modify a judgment disallowing in part a mechanic's lien so as to sustain the entire lien. *Wahle, Phillips Co. v. 59th St.-Madison Ave. Co.*, 153 App. Div. 17, 138 N. Y. 13. (9) In a suit in equity, the Appellate Division may grant final judgment without awarding a new trial, although it involves a reversal of some of the findings of the trial court. *Bonnette v. Molloy*, 153 App. Div. 73, 138 N. Y. Supp. 67.

Notwithstanding the power conferred by § 1317 of the Code as amended in 1912, the Appellate Division granted a new trial where the evidence was not before it, upon the possibility that further evidence could be produced on a new trial. *Tradesman Nat. Bank v. Boldt*, 155 App. Div. 72, 139 N. Y. Supp. 531.

**3928 n. 215.** Where there is no dispute as to the facts in an equity suit, court may direct such judgment as the parties are equitably entitled to. *Muck v. Hitchcock*, 149 App. Div. 323, 134 N. Y. Supp. 271.

**3928 n. 217.** If verdict is set aside by order granting a new trial, it will be reinstated, on reversal of the order, and judgment rendered on the verdict. *Willcox v. Supreme Council*, etc., 151 App. Div. 297, 136 N. Y. Supp. 377. Section does not apply where verdict is a general verdict. *Paltey v. Egan*, 200 N. Y. 83, 93 N. E. 267.

**3929 § 2837.** Rule 34 of the General Rules of Practice, as amended in 1913, reads as follows: "The Appellate Division, on rendering final judgment on appeal pursuant to the provisions of section 1317 of the Code of Civil Procedure, on reversing or modifying a judgment entered upon the decision of the court, or the report of a referee, without granting a new trial, may reverse any finding, and shall make such new findings of facts proved upon the trial as shall be necessary to sustain the judgment awarded by the Appellate Division. The facts as found by the Appellate Division shall be inserted in its order for judgment and the facts as found by the Special Term or referee before whom the case was tried which are reversed by the Appellate Division shall likewise be specified in such order." "Under the authority conferred by the Constitution in section 2 of article VI, to grant additional jurisdiction to the Appellate Division, we think the legislature possesses the power to enlarge the jurisdiction of that tribunal to the extent which has been indicated in this opinion; that is to say, to deal with the evidence in an equity suit

as the trial court should have done and direct judgment accordingly; but in exercising that power by the enactment of this amendment we think it intended in a case where additional findings are requisite to support the judgment which the Appellate Division orders that such findings must be made in express terms, in the order of reversal, and not left to be gathered from a study of the evidence by the Court of Appeals." *Bonnette v. Molloy*, 209 N. Y. 167, 172, 102 N. E. 559 [rev. on this point 153 App. Div. 73, 138 N. Y. Supp. 67]. On reversing findings of facts, the Appellate Division will substitute its own findings and then award judgment for appellant. *Union Trust Co. v. Oliver*, 155 App. Div. 646, 140 N. Y. Supp. 681. Statement that findings of fact are supported by the evidence does not affect the right to a further appeal nor limit the scope of the review. *Hall v. Brown*, 139 App. Div. 388, 124 N. Y. Supp. 52.

3929 n. 223. See also ante, 3841 § 2770.

3930 n. 225. But see changes by Code and General Rules of Practice (ante, 3802 n. 51).

3931. Amendment cannot extend the time to appeal. *Hall v. Brown*, 139 App. Div. 388, 124 N. Y. Supp. 52.

3931 n. 229. May be amended, at subsequent term, to show that affirmance was unanimous. *MacArdell v. Olcott*, 189 N. Y. 368, 82 N. E. 161. A motion by appellee to amend an order of reversal, entered by the Appellate Division, so as to read, "Reversed upon the law and not upon the facts," should be denied because there is no such form of reversal and also because the granting of the motion would do no good. *Gross v. Kathairo Chemical Co.*, 129 App. Div. 411, 113 N. Y. Supp. 243.

3932 § 2838. Order entered in lower court cannot allow costs where Appellate Division disallows them. *Wasey v. Holbrook*, 144 App. Div. 507, 129 N. Y. Supp. 272. Order of Appellate Division modifying a judgment must be filed

before it becomes a judgment. *Jackson v. Smith*, 154 App. Div. 883, 138 N. Y. Supp. 914.

**3935** § 2843. Where the appeal is from an order of the Appellate Term granting a new trial in an action tried in the Municipal Court of the city of New York, and the Appellate Term has not required a stipulation for judgment absolute, the Appellate Division has no authority to order judgment absolute. *Hart v. North German Lloyd Steamship Co.*, 108 App. Div. 279, 95 N. Y. Supp. 733.

## CHAPTER XVIII

### COSTS ON APPEAL

**3938** n. 3. *Contra*, *Hildas v. Central Hudson S. Co.*, 68 Misc. 426, 125 N. Y. Supp. 1022.

**3941** n. 15. *Contra*, *Hildas v. Central Hudson S. Co.*, 68 Misc. 426, 125 N. Y. Supp. 1022.

**3942**. Where the judgment is materially modified, costs will not be awarded to either party. *Fitch v. Hay*, 112 App. Div. 736, 98 N. Y. Supp. 1090.

**3942** n. 25. See *McWhirter v. Bowen*, 114 App. Div. 68, 99 N. Y. Supp. 560 (where costs were held properly imposed against a codefendant—respondent who appeared on the appeal and sought to sustain a judgment in his favor granting him substantial relief, although he did not appear in the lower court, where the Appellate Division struck out the clause in his favor).

**3944** n. 34. Order in highway proceedings as final order, see *In re Van Dusen*, 132 App. Div. 592, 116 N. Y. Supp. 915.

**3944** n. 37. Costs denied on reversing order where practice was unsettled. *Shiebler v. Suffolk Gas & Electric Light Co.*, 155 App. Div. 916, 140 N. Y. Supp. 1145.

**3944** n. 39. *Benjamin v. Brownstein*, 79 Misc. 84, 139 N. Y. Supp. 318.

**3945** n. 40. Certiorari, see *People ex rel. Shiels v. Greene*, 114 App. Div. 168, 99 N. Y. Supp. 679.

**3945** n. 44. But where appeal is from judgment and from the denial of a new trial on the ground of newly discovered evidence, the prevailing party is entitled to full costs of both appeals. *Pease v. Pennsylvania R. R. Co.*, 137 App. Div. 458, 122 N. Y. Supp. 784.

**3950** n. 71. Where an attorney is the real party interested he is properly required to pay the costs of an adverse decision. *Kelly v. New York City R. Co.*, 122 App. Div. 467, 106 N. Y. Supp. 894.

**3952** n. 81. *Vogel Co. v. Wolff*, 160 App. Div. 131. Costs before and after notice of argument are properly taxed against appellant where the appeal was dismissed only after it was called in its regular order on the calendar. *Dooley v. Union R. Co.*, 57 Misc. 145, 107 N. Y. Supp. 882.

**3953** § 2871. On appeal from order of City Court of New York granting a new trial, only motion costs and disbursements can be allowed. *Benjamin v. Brownstein*, 79 Misc. 84, 139 N. Y. Supp. 318.

**3955** n. 101. See also *Hill v. Muller*, 53 Misc. 262, 103 N. Y. Supp. 96.

**3955** n. 102. Rule applies to appeals to the Appellate Term. *Schwartz v. Ribaud*, 63 Misc. 64, 116 N. Y. Supp. 585.

**3955** n. 105. Compare *Koeppel v. Koeppel*, 51 Misc. 64, 99 N. Y. Supp. 872.

**3957** n. 114. But on dismissal of appeal from an order, costs limited to \$10 and disbursements. *Matter of Ives*, 155 App. Div. 670, 140 N. Y. Supp. 694.

**3957** § 2872. Where the case was made by the opposite party, the successful party is not entitled to costs therefor. *Koeppel v. Koeppel*, 51 Misc. 64, 99 N. Y. Supp. 872.

**3958** n. 121. Not where the record is for the most part immaterial to the issues. *Sullivan v. McCann*, 124 App.

Div. 126, 108 N. Y. Supp. 909. Where record unnecessary, rule is otherwise. *Holl v. Builders' Const. Co.*, 127 App. Div. 727, 111 N. Y. Supp. 876.

**3958** n. 122. Where a mere statement of the facts by affidavit would have been sufficient, the cost of printing an extensive record and brief will not be allowed. *Wise v. Cohen*, 113 App. Div. 859, 99 N. Y. Supp. 663. An order allowing a fixed sum to print the record on appeal was modified so as to require payment of the cost when the amount should be ascertained and the record printed in *Sternberger v. Sternberger*, 113 App. Div. 898, 98 N. Y. Supp. 946.

**3958** n. 124. See also *Matter of Rateau Sales Co.*, 72 Misc. 132, 129 N. Y. Supp. 445.

**3960** n. 134. But see ante, **3008** § 2168.

**3960** § 2876. On affirming a County Court judgment with costs, it cannot be contended that only motion costs should be taxed although only the part of the judgment vacating an attachment granted by a justice of the peace was objected to. *Shepard v. Campbell*, 51 Misc. 93, 100 N. Y. Supp. 751.

**3963** § 2878. Where Appellate Division reversed a dismissal of a complaint on a second trial, and defendant appealed with stipulation for judgment absolute, a judgment of affirmance of the Court of Appeals "with costs in all courts" gives the right to costs of the first trial and the first appeal. *Merkel v. Lazard*, 139 App. Div. 624, 124 N. Y. Supp. 140. "Costs in all courts" means every court in which the party has had to appear to uphold his claim. *Jones v. Gould*, 143 App. Div. 244, 128 N. Y. Supp. 280.

**3963** n. 148. *Brennan v. Joline*, 70 Misc. 537, 127 N. Y. Supp. 676, 2 Civ. Pro. Rep. (N. S.) 245. Compare *Feltenstein v. Ernst*, 54 Misc. 223, 104 N. Y. Supp. 423.

**3965** n. 159. *Matter of Kinn*, 139 App. Div. 766, 124 N. Y. Supp. 569. Rule held not applicable where final order in condemnation proceedings by city against owners of separate parcels of land who appeared by separate attorneys



was affirmed "with costs." In *re Pines Stream, etc.*, in Town of Hempstead, 62 Misc. 61, 114 N. Y. Supp. 681.

**3966 § 2879.** Where the remittitur of the Court of Appeals affirms in part and reverses in part the judgment in a suit in equity "without costs," the court below in entering final judgment cannot strike out costs previously allowed in the lower court. *Fulton v. Krull*, 151 App. Div. 142, 135 N. Y. Supp. 432.

**3966 n. 164.** "The rule seems to be well established that where the Court of Appeals in its discretion, as in this case (Code Civ. Proc., § 3238, subd. 2), awards or disallows costs, its determination of the subject applies to that court only." *Fulton v. Krull*, 151 App. Div. 142, 144, 135 N. Y. Supp. 432.

**3967 § 2880.** Where costs awarded to defendant to abide event, and judgment for defendant on second trial is reversed, judgment for costs falls. *Pelgram v. Ehrenzweig*, 58 Misc. 198, 109 N. Y. Supp. 54. The event contemplated is one which determines that the successful party is, by law, entitled to costs. So held in certiorari proceedings where Appellate Division, after reversal by Court of Appeals, made no subsequent order. *People ex rel. Shiels v. Greene*, 114 App. Div. 168, 99 N. Y. Supp. 679. If appellant is finally unsuccessful, other party may tax costs on the trial that was reversed and also for proceedings before and after granting the new trial. *Levine v. Klein*, 66 Misc. 571, 122 N. Y. Supp. 396.

**3968 n. 174.** *Buchanan v. Stout*, 139 App. Div. 204, 123 N. Y. Supp. 724; *Davis v. Reflex Camera Co.*, 114 App. Div. 814, 100 N. Y. Supp. 172. See also *Miller v. Buffalo*, 129 App. Div. 833, 113 N. Y. Supp. 1056.

**3968 n. 176.** *Mosseim v. Empire State Surety Co.*, 117 App. Div. 782, 102 N. Y. Supp. 1012 [citing *Nichols' Pr.*, § 2881]. But see *Adams v. Massey*, 51 Misc. 230, 100 N. Y. Supp. 836 (where a reversal of a judgment for defendant on a second trial with costs to abide the event, the Appellate

Division having reversed a judgment for plaintiff on the first trial, was held not to authorize the successful plaintiff on the third trial to tax the costs of the appeal from the first judgment).

**3969** § 2881. Costs of appeal cannot be taxed unless appellant is finally successful. *Dobek v. Austro Americana Steamship Co.*, 83 Misc. 641, 145 N. Y. Supp. 385. Includes all costs up to and including the decision, and respondent cannot tax costs if he succeeds. *Grill v. Gutfreund*, 3 Current Ct. Dec. 114. "Event" means the result of the further trial; and where plaintiff (appellee) recovers less than \$50 so as to entitle defendant to costs, defendant is entitled to costs of appeal and of both trials, notwithstanding on the first trial plaintiff recovered more than \$50. *Lennon v. Charig*, 54 Misc. 298, 105 N. Y. Supp. 1039. Costs of appeal to Appellate Term, see *La Rosa v. Wilner*, 54 Misc. 574, 104 N. Y. Supp. 952.

**3969** n. 179. Costs and disbursements of respondent on former appeal cannot be allowed. *Walnut Hill Bk. v. Nat'l Reserve Bank*, 76 Misc. 208, 134 N. Y. Supp. 504.

**3969** n. 180. Rule applies to reversal by Appellate Term. *Berreut v. Simpson*, 61 Misc. 611, 113 N. Y. Supp. 1065.

**3970** n. 182. *Hill v. Muller*, 53 Misc. 262, 103 N. Y. Supp. 96.



## PART II

### APPEALS FROM SURROGATE'S COURT

**3974** § 2886. The Code provisions relating to appeals are now §§ 2754–2764 of the Code.

**3974** § 2887. An order overruling objections to the jurisdiction of the court, which is not final because jurisdiction has not been exercised, does not involve a substantial right so as to be appealable. *Matter of Loewenguth's Estate*, 114 App. Div. 754, 100 N. Y. Supp. 422. A surrogate's order reversing an order assessing a transfer tax is appealable. *Matter of Hull's Estate*, 109 App. Div. 248, 95 N. Y. Supp. 819.

**3974** n. 4. Appellate Division may open discretionary order of Surrogate's Court. *In re Doig*, 125 App. Div. 746, 110 N. Y. Supp. 93.

**3974** n. 5. This is now § 2754 of the Code.

**3975.** Order denying motion for an order disallowing proposed interrogatories is appealable. *Matter of Hernandez*, 158 App. Div. 815, 144 N. Y. Supp. 150. Order overruling demurrer of executor to petition for his removal and directing him to file an intermediate account does not affect a substantial right so as to be appealable. *Matter of Kelly*, 153 App. Div. 322, 137 N. Y. Supp. 1099.

**3975** n. 21. *Matter of Costello*, 117 App. Div. 807, 103 N. Y. Supp. 6.

**3976** n. 24. Testamentary trustees are parties not aggrieved by an allowance to a special guardian only when the cestui que trust is an adult. *Matter of Stevens*, 114 App. Div. 607, 99 N. Y. Supp. 1070.

**3977** n. 30. *Matter of Edwards*, 110 App. Div. 623, 97 N. Y. Supp. 185 (where payment of allowance to him was held not to waive his right to appeal).

**3979** n. 42. This provision is now § 2756 of the Code and is modified by striking out the second sentence and adding "except that the party entering such decree or order shall not be entitled to further notice to limit his time to appeal." Copy of decree need not be addressed to the person to be served. *Matter of Heldmann*, 153 App. Div. 583, 138 N. Y. Supp. 59. Where attorney appears for two parties, notice of entry of decree need not be served on him so as to indicate that he is served as attorney for both clients. *Matter of Heldmann*, 153 App. Div. 583, 138 N. Y. Supp. 59.

**3979** n. 45. This is now § 2756 of the Code.

**3979** nn. 46, 48. These provisions are not in the Code as amended in 1914.

**3980** n. 50. This Code provision, now § 2756 of the Code, as now amended, strikes out the last two sentences.

**3981** n. 51. In *re Hunt's Will*, 120 App. Div. 883, 105 N. Y. Supp. 59. This provision is now § 2755 of the Code and is modified so as to read: "Each party who has appeared in the special proceeding in the surrogate's court must be made a party to the appeal. A person not a party may be brought in by an order of the appellate court made after the appeal is taken, in such manner as the order may prescribe."

**3982** § 2894. Parts of former §§ 2579, 2582-2584 are combined in the section of the Code now numbered § 2557. The sections of the Code which were formerly §§ 2577-2584 of the Code are now §§ 2759-2762, which should be referred to for minor changes in the former Code provisions. Construction of as to liability on, see *Ahlbach v. American Bonding Co.*, 132 N. Y. Supp. 741.

**3982** n. 64. This provision is now contained in § 2758 of the Code.

**3982** n. 66. Section 1335 of the Code (see vol. 4, 3765-

3768) does not apply to appeals from a Surrogate's Court to the Appellate Division. *Matter of Sheldon*, 117 App. Div. 357, 103 N. Y. Supp. 177.

**3983 n. 69.** Does not apply to an appeal from a practice order such as one denying a reference and directing the trial to proceed before the court. *Matter of Williams*, 135 App. Div. 123, 119 N. Y. Supp. 892.

**3984 n. 73.** *Matter of Dittrich's Estate*, 52 Misc. 277, 102 N. Y. Supp. 1124.

**3986 n. 83.** This Code section is now § 2757 of the Code, and includes appeals from a decree rendered upon the trial by the surrogate and a jury.

**3987 n. 85.** *Matter of Sprathoff's Estate*, 50 Misc. 109, 98 N. Y. Supp. 921.

**3987 § 2998.** On an appeal from an order refusing to open the probate of a will, the question of the proper execution of the codicil was held, under particular circumstances, not reviewable. *Matter of Gaffney's Estate*, 116 App. Div. 583, 101 N. Y. Supp. 882.

**3988 n. 95.** *In re Rossell*, 121 App. Div. 381, 105 N. Y. Supp. 1098; *Matter of Burr*, 116 App. Div. 518, 101 N. Y. Supp. 776. This provision is now part of § 2673 of the Code.

**3988 n. 99.** The surrogate's discretion in denying an executor his statutory commissions because of misconduct is reviewable. *Matter of Gall*, 107 App. Div. 310, 95 N. Y. Supp. 124.

**3989 n. 102.** *Matter of Hoffman*, 136 App. Div. 516, 121 N. Y. Supp. 184.

**3989 n. 104.** This Code provision is now part of § 2763 of the Code.

**3990 n. 106.** *Matter of Newcomb*, 192 N. Y. 238, 84 N. E. 950. This is now § 2737 of the Code.

**3990 n. 109.** *In re O'Gorman's Will*, 127 App. Div. 159, 111 N. Y. Supp. 274. Must order a new trial on reversing a

~~decree~~ denying probate of a will. Matter of Van Woert, 207 N. Y. 756, 101 N. E. 466.

**3991** n. 111. Matter of Finch's Will, 115 App. Div. 871, 101 N. Y. Supp. 135; Matter of Burtis' Will, 107 App. Div. 51, 94 N. Y. Supp. 961.

**3991** n. 113. This is now § 2764 of the Code.

**3991** § 2901. Where decree is reversed "with costs," and without specification of disbursements surrogate has no power to include disbursements in his taxation of costs. In re Moran's Estate, 60 Misc. 298, 113 N. Y. Supp. 276.

## PART III

### APPEALS TO THE COUNTY COURT

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#### CHAPTER I

##### GENERAL CONSIDERATIONS

**3995** § 2905. There is no appeal from orders of justices except in certain instances specifically mentioned in the statute. *Hindes v. Mills*, 51 Misc. 552, 101 N. Y. Supp. 843 [citing *Nichols' N. Y. Pr.*, § 2905].

**3995** n. 12. This Code provision is now Cons. Laws, c. 33, § 51.

#### CHAPTER II

##### TAKING THE APPEAL

**3998** n. 11. *Stilwell v. Rowe*, 83 Misc. 297, 145 N. Y. Supp. 1095.

**3999** n. 12. *Hotchkiss v. King*, 155 App. Div. 850, 140 N. Y. Supp. 495.

**3999** n. 14. This provision was amended in 1913 (c. 445) so as to authorize service by mail.

**4000** n. 16. This provision was amended in 1913 (c. 445) by authorizing service personally or, in any case, by leaving at residence or service by mail on the respondent, or by service on respondent's attorney either personally or by mail. The last clause omits the reference to "within the county."

**4000** § 2909. Need not include a sum awarded by an ap-



pellate court on reversing a former judgment and conditioned to abide the event. *Digby v. Aldinger*, 69 Misc. 557, 125 N. Y. Supp. 495.

4001 n. 23. Rule applied on appeal from City Court of Albany. *Matter of Phillips v. Hogan*, 142 App. Div. 205, 126 N. Y. Supp. 1088.

4001 n. 27. *J. & M. Electric Co. v. Centotella*, 77 Misc. 670, 138 N. Y. Supp. 571.

### CHAPTER III

#### STAY OF EXECUTION

No New Matter Has Been Found for This Chapter

### CHAPTER IV

#### RETURN

4010 n. 13. This Code provision is now Cons. Laws, c. 30, § 523.

4012. Amended complaint filed with justice of the peace after the trial cannot be included in the return except by consent of the parties. *Smith v. Smith*, 133 App. Div. 547, 118 N. Y. Supp. 21.

4012 n. 24. See *Van Slyke v. Disbrow*, 64 Misc. 1, 117 N. Y. Supp. 620.

4014 § 2924. Use of affidavit in addition to return, see *Molinski v. Burnett*, 152 App. Div. 428, 137 N. Y. Supp. 259.

4014 § 2925. Where judgment rendered without proof of the cause of action, the County Court will not permit the record to be amended by inserting a constable's return showing that a verified complaint was served with the summons. *Sloan v. Dickey*, 68 Misc. 593, 124 N. Y. Supp. 609.

4015 n. 50. See *Pitkin v. Clifford*, 118 App. Div. 509, 103 N. Y. Supp. 511.

## CHAPTER V

## REVIEW AND JUDGMENT WHERE NEW TRIAL NOT HAD

**4018** n. 8. *Coleman v. Keady*, 53 Misc. 520, 105 N. Y. Supp. 299. Excuse held not satisfactory. *McCall Co. v. Unser*, 132 App. Div. 371, 116 N. Y. Supp. 826. That defendant made a mistake as to the return day because of failure to carefully read the summons is not ground. *Hotchkiss v. King*, 155 App. Div. 850, 140 N. Y. Supp. 495. Failure to state grounds for expectation of ability to prove a fact presumptively within deponent's (defendant) knowledge at the time of the default, and merely tending to reduce the damages, and to state an excuse for furnishing the affidavit of some one having knowledge, precludes the granting of relief hereunder. *Hotchkiss v. King*, 155 App. Div. 850, 140 N. Y. Supp. 495.

**4019** § 2931. If appeal is taken on questions of law, the County Court is bound by the justice's findings on disputed questions of fact. *Willson v. Fisher*, 75 Misc. 382, 135 N. Y. Supp. 532.

**4019** n. 17. *Van Allen v. Shulenburgh*, 58 Misc. 136, 110 N. Y. Supp. 464.

**4020** § 2933. "In the determination of controversies involving small amounts, litigants are obliged to apply to courts of justices of the peace in their localities. These magistrates are frequently unlearned in prescribed procedure and the courts are indulgent in the review of their determinations. Unless some vital error has been committed, their judgments will be sustained." *Read v. Bingham*, 71 Misc. 107, 109, 129 N. Y. Supp. 909.

**4021** n. 38. *Clinton v. Frear*, 107 App. Div. 571, 95 N. Y. Supp. 321; *International Tailoring Co. v. Bennett*, 113 App. Div. 76, 99 N. Y. Supp. 438.

**4022** n. 39. *Wears v. Johnson*, 151 App. Div. 770, 136

N. Y. Supp. 316; *Vandeymark v. Corbett*, 131 App. Div. 391, 115 N. Y. Supp. 911; *Spears v. Sorge*, 106 N. Y. Supp. 141; *International Tailoring Co. v. Bennett*, 113 App. Div. 476, 99 N. Y. Supp. 438; *McRavy v. Barto*, 114 App. Div. 262, 99 N. Y. Supp. 712; *McDonald v. Dunbar*, 114 App. Div. 306, 99 N. Y. Supp. 768; *Clinton v. Frear*, 107 App. Div. 571, 95 N. Y. Supp. 321. Findings on questions of fact should not be disturbed, on appeal to the County Court from a justice of the peace, unless clearly contrary to law or against the weight of evidence. *Doughty v. Kingsley*, 69 Misc. 142, 126 N. Y. Supp. 285.

**4022** § 2934. The ruling in *Hindes v. Mills*, 51 Misc. 552, 101 N. Y. Supp. 843, is abrogated by the 1913 amendment to § 3063 of the Code permitting the appellate court to "modify" as well as affirm or reverse. If a new trial is not demanded, on appeal from a judgment rendered after trial by a jury, questions of law only are reviewable and a new trial cannot be ordered. *Trubenback v. Nelson*, 73 Misc. 466, 133 N. Y. Supp. 388.

**4022** n. 41. On reversing verdict as against the weight of evidence, new trial should be granted in the Justice's Court, before the same justice. *Brown v. Sullivan*, 155 App. Div. 875, 139 N. Y. Supp. 555. No authority to direct a new trial and payment of costs on ground that there was no evidence to sustain the judgment. *Robischon v. Moore*, 135 App. Div. 699, 119 N. Y. Supp. 252. On reversing on questions of law, the County Court cannot order a new trial. *Tichnor Bros. v. Barley*, 72 Misc. 638, 132 N. Y. Supp. 243. On reversing because complaint was erroneously dismissed, the County Court has no authority to direct a new trial. *Papenmeyer v. Roddy*, 145 App. Div. 579, 129 N. Y. Supp. 868. New trial can be ordered only where judgment is contrary to or against the weight of evidence. *Gasson v. Atkins*, 59 Misc. 145, 112 N. Y. Supp. 224. On reversing because of an erroneous finding of fact by the jury, the County Court

cannot render judgment absolute, but must reverse and grant a new trial. *King Paint Co. v. Lang*, 82 Misc. 362, 144 N. Y. Supp. 444.

**4022** n. 42. Distinguished in *Leonard v. Rima*, 82 Misc. 358, 144 N. Y. Supp. 447.

**4023** n. 46. Cannot render judgment absolute, where reversal is because the verdict was against the evidence. *King Paint Co. v. Lang*, 82 Misc. 362, 144 N. Y. Supp. 444.

**4023** n. 49. Sufficiency of excuse, see *Coleman v. Keady*, 53 Misc. 520, 105 N. Y. Supp. 299.

**4025** § 2936. The County Court may grant a motion for a reargument. *Bumpus v. Anderson*, 49 Misc. 417, 99 N. Y. Supp. 826.

**4025** n. 61. If parties do not appear on an adjourned day, a judgment of nonsuit is proper; and plaintiff cannot thereafter move in the County Court for an order fixing another date for the trial. *Leonard v. Rima*, 82 Misc. 358, 144 N. Y. Supp. 447.

## CHAPTER VI

### NEW TRIAL IN COUNTY COURT

**4028** n. 7. So where counterclaim is clearly demurrable. *Smith v. Rensselaerville Creamery Co.*, 131 App. Div. 387, 115 N. Y. Supp. 273.

**4030** n. 19. *Morgan v. Zimmer*, 120 App. Div. 672, 105 N. Y. Supp. 914.

**4031** n. 23. Defense not pleaded before the justice cannot be set up. *Mathews v. Hill*, 153 App. Div. 933, 138 N. Y. Supp. 1129.

## CHAPTER VII

### COSTS

**4035** n. 6. Contra, where recovery less than \$50. *Bell v. Lynch*, 80 Misc. 683, 142 N. Y. Supp. 676.



## INDEX

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